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Abbreviations

AA	Automobile Association
Benson	Royal Commission on Legal Services [1979]
CJR	Report of the Review Body on Civil Justice [1988]
CLAF	Contingency legal aid fund
DSS	Department of Social Security
EC	European Community
FES	Family Expenditure Survey
He, him etc.	He/she, him/her etc.
IS	Income Support
LAA 1988	Legal Aid Act 1988
LAAC	Lord Chancellor's Advisory Committee on Legal Aid
LAAO	Legal Aid Assessment Office
LAB	Legal Aid Board
LCD	Lord Chancellor's Department
LEI	Legal expenses insurance
1978 report	2nd Report of the LAAC's Financial Provisions Working Party [1978]
1983 scrutiny	Joint Review of Arrangements for Assessing Financial Eligibility for Civil Legal Aid [LCD/DHSS 1983]
1983/84 review	Review of eligibility for legal aid [LAAC 1985]
1986 scrutiny	Legal Aid Efficiency Scrutiny [LCD 1986
RAC	Royal Automobile Club
RPI	Retail Price Index
Rushcliffe	Report of the Committee on Legal Aid and Legal Advice in England and Wales [1945]
TUC	Trades Union Congress
UCAPS	Unified control and payment system

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SUMMARY OF THE PAPER

1. This paper sets out the provisional conclusions which have emerged from the review of the financial conditions for non-family civil legal aid.

Part I (Chapters 1-3)

2. Chapter 1 sets legal aid in the context of the legal system as a whole. It sees the provision of financial assistance as an essential part of the adversarial system of dispute resolution in which parties need skilled legal help. Chapter 2 identifies the key issue of the affordability of such help with legal proceedings. It argues that this is an issue for both the individual litigant and the taxpayer, who cannot simply pay the difference between what individuals can afford and what lawyers wish to charge. There is therefore a relationship between eligibility and the way legal services are delivered. Lawyers have a responsibility for providing the services required at a price which can be afforded. It also important that legal aid is better targeted to need. This requires consideration not only of the means of applicants but also of the costs they face, the problems created by uncertainty about the likely cost and the alternative sources of funding available to them. Chapter 3 summarises the work of the review.

Part II (Chapters 4-6)

3. The second part of the paper looks at alternatives to publicly funded legal aid. Chapter 4 discusses a number of alternatives, including contingency fees, loans and state subsidised insurance. Chapter 5 considers legal expenses insurance and concludes that while it is now available and will be found useful to many people, there are a number of problems to be overcome if it is ever to be considered as a substitute for state legal aid. Chapter 6 describes the operation of a contingency legal aid fund, which covers the costs of unsuccessful parties from a percentage of the damages obtained

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by successful parties (and from fixed fees) and which could extend the provision of legal assistance at no net cost to the taxpayer. It also sets out a number of drawbacks to this sort of scheme, particularly the extent to which it is proper for successful parties to subsidise the unsuccessful.

Part III (Chapters 7-9)

4. Chapter 7 looks at ways in which legal aid could be better used and administration improved within the current system. It considers possible changes to the means assessment procedure and the way contributions are calculated. Chapters 8 and 9 describe the "safety net" approach under which litigants would fund their cases privately up to an individually assessed spending limit beyond which they would become eligible for legal aid. This would extend legal aid to those now ineligible but who may face high costs while excluding those who do not require assistance.

Annexes

5. Annex A contains statistics on the use of legal aid at present. Annexes B to F cover the work and findings of the review. Annex G describes legal expenses insurance as it is currently available. Annex H calculates the percentage deductions and fees necessary to sustain a self-financing contingency legal aid fund. Annex J estimates the cost of a safety net scheme. Annex K considers the scope for simplifying the existing means assessment procedures.

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REVIEW OF FINANCIAL CONDITIONS FOR LEGAL AID

ELIGIBILITY FOR CIVIL LEGAL AID

INTRODUCTION

1. In November 1989 the Lord Chancellor, in answering a Parliamentary question from The Viscount Dilhorne, announced a general review of all the financial conditions for the grant of legal aid. The review would "look at all aspects of the financial conditions, including the upper (eligibility) limit, the lower (free) limit, the amount of contribution payable and the statutory charge, as well as the machinery for assessing means and enforcing the payment of contributions... [It would] explore the possibility of examining individual applicants' means in relation to the likely cost of different kinds of proceeding, [and would] consider the availability of legal expenses insurance and the position of those who proceed without legal aid"[1].

2. The review is being conducted by a team of officials in the Lord Chancellor's Department (LCD), advised by a Working Group, including representatives of The Scottish Office Home and Health Department, the Northern Ireland Court Service, the Legal Aid Board, the Scottish Legal Aid Board and the Department of Social Security's Legal Aid Assessment Office.

3. The review team has also received assistance from a number of other bodies. These included The Law Society of England and Wales, the Association of British Insurers, the Automobile Association (AA), the Trades Union Congress (TUC) and a number of individual solicitors' firms and insurance companies.

4. The review, which has been divided into three main stages, will take up to three years in all. The phasing of the review is linked to other parts of the Lord Chancellor's strategy for

[1] Lords Hansard, 13 November 1989, col. 1211-12

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reforming the legal system. The first stage concentrates on civil legal aid to correspond with the implementation of the Civil Justice Review (CJR). The consideration of legal aid for matrimonial and other family cases will depend on decisions about the Law Commission's recommendations on divorce and the role of conciliation, which form part of the rolling programme of changes in family law, jurisdiction and procedure. The Legal Advice and Assistance scheme and the operation of the statutory charge will also be covered at that stage. The next stage of the review will therefore look at legal aid in criminal proceedings.

5. This consultation paper sets out provisional thinking about civil legal aid in England and Wales. Its conclusions are also valid for Northern Ireland, subject to minor differences of circumstances. A parallel paper, covering the situation in Scotland, will be issued shortly by The Scottish Office.

6. Part 1 of the paper discusses the general issues surrounding eligibility for legal aid and describes the conduct of the review. The rest of the paper considers a number of options for the future. Part II covers alternative methods of funding litigation, and Part III discusses new approaches to legal aid itself.

7. Comments are invited from interested parties on any of the issues raised by this paper, and particularly on the questions discussed in the conclusion. Responses should be sent by 31 October 1991, to:

Mr. M. Kron
Lord Chancellor's Department
Trevelyan House
30 Great Peter Street
London SW1P 2BY

Additional copies of this paper can be obtained from Mr. M. Morgan at the same address (Tel. 071 210 8826).

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8. Respondents who wish to comment on the application of the proposals to Northern Ireland should send their comments to:

Mr. A. Fulton
Northern Ireland Court Service
19th Floor Windsor House
Bedford Street
Belfast BT2 7LT

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PART I: CONTEXT AND ISSUES

Chapter One

LEGAL AID AND THE LEGAL SYSTEM

Context of the review

1. Legal aid is a form of conditional financial support, provided by the taxpayer, for individuals whose financial circumstances would prevent them from taking or defending proceedings without assistance with their legal costs. The review considers legal aid in the wider context of legal services in general and the legal system as a whole. It represents one part of a wider strategy for reform, which addresses all the components of the legal system: the courts and their procedures and the activities of the legal profession, as well as legal aid itself.

2. The court system in England and Wales is an adversarial one, that is to say that the parties, and not the court, are responsible for formulating their cases, gathering the evidence to support them and presenting them to the court. As a result, skilled help is likely to be needed in all but the simplest cases; indeed, without lawyers the courts as currently organised could not properly function.

3. In the longer term, changes in law or procedure may lead to the development of alternative ways of resolving issues and providing legal services and therefore different approaches to legal aid. These changes may include:

(a) the greater use of non-adversarial methods of dispute resolution, particularly in matrimonial matters;

(b) the development of no-fault compensation schemes, for example for road traffic injuries; and

(c) the promotion of low-cost legal services to deal with high volume, small value claims, including many of the issues currently dealt with by tribunals.

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4. However, legal advice and representation is likely to remain necessary for those pursuing or defending legal rights in most types of civil and criminal case. The conditions on which legal aid is granted may quite properly vary, according to the type of proceedings involved. The existing financial conditions for criminal legal aid, where there is no upper eligibility limit, recognise the special considerations which apply to a defendant, who has no choice but to be a party to proceedings which may have very serious consequences for him. Rather different factors may apply in civil cases (see Chapter 2 paragraph 7).

5. However, there are also other approaches, apart from subsidy by the taxpayer, to the problem of funding litigation. The review considers alternative sources of funding, which might be available to assist some potential litigants without recourse to the public purse. Nevertheless, legal aid to pay for the services of lawyers is likely to remain the only solution for those who can afford to pay nothing themselves.

Civil legal aid

6. The rest of this paper is concerned with non-family civil proceedings[2]. All references to legal aid refer to legal aid for such proceedings, unless otherwise stated. Readers who are unfamiliar with the current scheme may find the following brief outline helpful. A fuller summary can be found in the Legal Aid Guide and full details in the Legal Aid Handbook, both issued by the Legal Aid Board.

7. Civil legal aid is available for representation in court proceedings and for steps preliminary or incidental to those

[2] The LAB currently classifies cases as matrimonial or non-matrimonial. The latter therefore includes some family-related cases, such as adoption and wardship. Such cases appear in the statistics analysed in annexes A to D of this paper, but would not be covered by the options described in chapters 6 to 9.

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proceedings. The legal aid scheme in England and Wales is administered by the Legal Aid Board (LAB), subject to the guidance of the Lord Chancellor, under the provisions of the Legal Aid Act 1988, the Civil Legal Aid (General) Regulations 1989 and the Civil Legal Aid (Assessment of Resources) Regulations 1989. Similar provisions apply in Northern Ireland.

8. Applications for legal aid are made through a solicitor to the LAB. An applicant must show that he has reasonable grounds for taking or defending court proceedings and that it is reasonable to grant legal aid in the circumstances of the case (the merits test). He must also qualify financially. An assessment of the applicant's means is carried out on behalf of the LAB by the Legal Aid Assessment Office. The purpose is to determine whether an applicant's disposable income and capital fall within the financial eligibility limits for the grant of legal aid, and assess the contribution, if any, which is payable in respect of either. About 80% of those granted legal aid certificates are not required to pay a contribution.

9. If an assisted party is successful and his costs are recovered in full from his opponent, he will have to pay nothing and any contribution will be refunded to him. If costs are not recovered in full, the contribution can be retained to cover the deficit, and any further deficit may be made good from any money or property recovered or preserved in the proceedings (the statutory charge).

10. Under s. 17 of the LAA 1988, an unsuccessful assisted party may be liable for his opponent's costs, but only up to the amount, if any, which it is reasonable for him to pay in all the circumstances. Where a costs order is made, it is often limited to a sum equivalent to the assisted person's legal aid contribution, which may of course be less than his opponent's costs. S. 18 of the LAA 1988 provides for an unassisted party's costs to be paid from the legal aid fund, but only where he was the defendant and would otherwise suffer financial hardship.

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Chapter Two

CIVIL LEGAL AID: AFFORDABILITY

1. The review is being conducted against a background of rising demand for civil legal aid and rising expenditure (as shown in Tables 1 and 2[3]). For example, in the five years 1985/86 - 1989/90 the number of legal aid certificates issued increased by 22%, gross expenditure rose by 120% from £70 million to £153 million and net expenditure - the cost to the taxpayer - by 145% from £31 million to £76 million. Over the same period, the average legal aid bill rose by 60% from £950 to £1526. This compares with an increase of 22% in the Retail Price Index (RPI) and 38% in average earnings.

2. Despite increases in volume and expenditure, there is concern that under the present eligibility regime potential litigants are being denied access to justice. This concern is frequently expressed in terms of the number of households or individuals whose resources take them outside legal aid eligibility limits. Table 3 shows estimates of the numbers eligible in 1989 and 1990, compared with a high point in 1979. A related concern is that at any level of means a fixed eligibility limit will exclude people whose means are at best moderate in relation to the costs they may face, and who therefore fall into an "eligibility gap".

3. A key issue for the review is therefore affordability as seen from the point of view of individual litigants and of the taxpayer.

4. In the absence of financial help, high cost can be an absolute barrier to litigation for those with very limited resources. Others will be able to proceed with a greater or lesser degree of financial sacrifice. Whether they choose to make

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[3] The statistical tables which support the arguments in this chapter can be found in Annex A.

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this sacrifice should largely depend on the importance to them of the issue at stake. However, some may be deterred from proceeding simply by fear or uncertainty about the level and incidence of costs, rather than by an absolute figure (see paragraphs 14-16 below).

5. As the average cost of cases increases, affordability becomes more of a problem for individual litigants, and an eligibility gap opens up. This puts pressure on the Government to chase rising costs with higher eligibility for legal aid. At the same time however, there is less money available to pay for this, as rising costs also push up the total legal aid bill. Any solution must therefore ensure that litigation is affordable and that legal aid is limited to those who need it.

Costs protection

6. Unlike other state benefits, the grant of legal aid can also affect a third party, the opponent. Sections 17 and 18 of the Legal Aid Act 1988 involve a derogation from the normal rule that "costs follow the event". Section 17 protects the assisted person from costs he would not be able to afford, and section 18 helps control the overall cost of the scheme to the taxpayer by limiting the potential liability of the legal aid fund for the costs of unsuccessful cases which it has backed. The grant of legal aid can therefore significantly disadvantage the opponent, who may feel compelled to concede an arguable case, rather than risk facing substantial costs even if he is successful. This underlines the importance of ensuring that legal aid and the protection it entails is only available where it is needed and for meritorious cases. The legal profession has a role to play in respect of the latter condition.

The need for legal aid

7. In public debate, the availability of legal aid appears to have become synonymous with "access to justice". Legal aid is

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seen as virtually the only recourse for individuals seeking to litigate and its absence as justice denied. However, it was suggested in Chapter 1 (paragraph 4) that the ability to proceed with civil litigation does not automatically have the same fundamental importance as the defence of a criminal charge. In practice, the importance of enforcing a particular legal right could vary considerably, according not only to the type of proceedings (eg. contract or medical negligence), but also the status of the parties and the circumstances of the case (eg. the size of the claim relative to the claimant's means).

8. This wide variety of cases and circumstances makes it difficult to assess either the worth or importance of the individual cases for which assistance is sought, or the appropriate priority for public expenditure on civil legal aid in general (broadly defined by the eligibility limits).

9. The legal aid merits test assesses the reasonableness of individual cases in a legal sense and to a very limited extent in a practical one, considering for example whether the opponent has the means of satisfying a judgment. It makes virtually no attempt to assess the importance of the case to the applicant. By contrast, private litigants, suitably informed about all the risks involved, are in a position to make judgements about the importance to them of their case. Therefore, so far as those who can afford to pay something towards litigation are concerned, the emphasis should be on the contributory system to encourage litigants to attach a realistic priority to the pursuit of legal remedies. This is discussed further in Chapter 7, paragraphs 5-9.

10. So far as the overall provision of civil legal aid is concerned, it has been suggested that effectiveness of cover should be judged by the maintenance of a particular percentage of the population within the scheme. This approach is unsatisfactory for the following reasons.

(a) It does not target need, because it does not relate means to costs.

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(b) It presupposes that the distribution and level of means in the population remains constant relative to the cost of litigation.

(c) It sees legal aid as the only means of funding the litigation of those who cannot afford to fund it themselves. However, the volume of general litigation has increased, despite the perceived "eligibility gap". Table 5 shows the total number of civil cases of various types commenced between 1985 and 1989, and estimates the proportion which represents individual litigants. Chapter 4 discusses some of the alternatives to legal aid which individuals can use to fund litigation.

11. This paper therefore adopts a different approach to eligibility. It emphasises the need of the prospective litigant for assistance in meeting the cost or overcoming the fear of cost. Eligibility should depend on the available means of individual applicants in relation to the costs which they face.

12. As part of the review, a survey was conducted of the costs of 17000 recently closed legal aid cases (see Annex D). This showed that the legal aid costs of the assisted party were less than £2500 in 86% of the cases and less than £1000 in 56%. These are not inconsiderable sums, and of course unassisted litigants could face somewhat higher charges, as well as the risk of paying their opponent's costs if they were unsuccessful (see Annex E). Furthermore, there are a few cases which are very expensive: 2 in 1000 cases in the survey had costs of more than £25000. Nevertheless, although average costs have been rising rapidly, in the great majority of civil cases costs are not as high as may generally be feared.

13. Nevertheless there remains a firmly entrenched belief, not least among lawyers, that legal costs are beyond the reach even of those of above average means. The President of The Law Society, in his address to the Society's conference in October last year, commented that few solicitors present would be able to afford their own firms' fees. This demonstrates very clearly that the problem of access to justice does not begin with legal aid. It begins with the way in which lawyers choose to operate and how they charge for their services.

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14. Objectively, it is clear that the greatest obstacle to the moderately well off is uncertainty, and therefore fear, about legal costs. A survey conducted in July 1990 by the Consumers' Association, as part of their report on legal expenses insurance, supports this conclusion. It found that 11% of people in the sample taken had considered seeking legal advice in the past but been put off by the thought of the cost.

15. There are three main sources of uncertainty about costs.

(a) Although most cases are not hugely expensive, there is no absolute guarantee that what starts as a moderate-sized case will not turn into a much larger and costlier one. There is no limit in advance to the ultimate bill.

(b) In England and Wales, the basic rule is that "costs follow the event" ie. the loser pays the winner's reasonable costs as well as his own. Thus the cost faced turns largely on the outcome of the litigation.

(c) Some solicitors appear unwilling, and many seem unable, to assess the likely cost or even give clear information about their basis for charging. The Council of The Law Society has recommended that solicitors disclose their charges, but declined to make it obligatory to do so. Many solicitors remain reluctant to advertise their costs. This makes it more difficult for clients to compare prices and services and to know what they face. It is also said that many solicitors are unwilling to commit themselves to a view about prospects of success, pleading the uncertainties of litigation.

16. The antidote to uncertainty is clear and reliable professional advice about the prospects of success and the likely duration and cost of the case. Litigation will always hold some scope for surprises, although this will be reduced by the move to greater procedural openness in the CJR. But the ability to make reasonably accurate forecasts over the broad run of cases must be the hallmark of a competent lawyer, not least because he knows how to exercise control over the process and deal with awkward or prevaricating opponents.

17. To summarise, need can be addressed in a number of ways. Direct financial support for the cost of obtaining legal services

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will be needed in many cases. For others, contingent support may sometimes be appropriate depending on a litigant's means and costs. More generally, it is extremely important to reduce the deterrent effect of uncertainty, and vital to ensure that litigation is made affordable. In both these respects, the quality and reliability of the legal services provided will be critical.

Efficiency and the Control of Cost

18. While the cost of most cases may not be as high as is feared, nevertheless litigation under an adversarial system is a resource intensive process. Control of cost is vital regardless of whether a case is to be funded privately, through state legal aid or by some other means. Legal expenses insurers, for example, if they are to offer a worthwhile product at a reasonable premium, must have mechanisms for assessing the merits of the cases they back and for monitoring their cost. In every case, the legal profession has a responsibility to provide high quality legal services efficiently and effectively.

19. In a perfect market, competition would regulate prices and encourage efficiency. In practice there are a number of factors which stand in the way of market forces in the market for legal services. A number of rigidities in the structure of the profession have been tackled by the provisions of the Courts and Legal Services Act 1990; it is not intended to cover them further in this paper. However, a major continuing problem for private litigants is lack of the knowledge and information, for example about likely costs or even about solicitors' charging rates, which would enable them to demand quality and value for money. Alongside this, the involvement of the legal profession in other lucrative types of work is likely to force up the price it would wish to charge for litigation, while on the other hand legal aid itself produces a guaranteed demand in this area.

20. While the onus for achieving improvements in efficiency is

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primarily on the legal profession, the Government and the Legal Aid Board have an important part to play in providing an appropriate framework. The Lord Chancellor's strategy fulfils this role, for example by tackling inefficiencies in court procedure through the implementation of the CJR proposals.

21. A major barrier to the improvement of quality and efficiency may lie in the distribution of legally aided work. At present, any solicitor or barrister who is willing to do so may take legal aid cases. Table 6 shows that a substantial proportion of legal aid work is distributed among a very large number of solicitors firms, suggesting that a large number of solicitors are each handling quite small numbers of cases. This begs the question whether there is sufficient concentration to maximise efficiency. Firms handling relatively small volumes of litigation are unlikely to be geared up to do it as efficiently as those whose turnover allows them to install the necessary support systems, develop expertise and take advantage of economies of scale.

Franchising

22. The Legal Aid Board (LAB) is tackling the question of quality and efficiency by developing proposals to concentrate legal aid work in the hands of "franchised" solicitors' firms and advice agencies. Franchising involves identifying solicitors (not necessarily from large firms) who can satisfy clear criteria of reliability, efficiency and competence. The resulting quality assurance would make it possible to assist franchisees by freeing them from some of the administrative restrictions currently associated with legal aid. Initially, LAB is looking at the Green Form Legal Advice and Assistance Scheme, but in the longer term the system could readily be extended to civil and criminal legal aid.

23. It may be argued that franchising could eventually restrict the principle of the client being free to choose his lawyer. In theory, free choice should promote competition and hence a better quality of service. A doubt arises when informed choice is

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difficult. In these circumstances, franchising should help the consumer exercise his choice, as well as safeguarding the interests of the tax-payer and rewarding the competent practitioner.

Unified control and payments system

24. Another important step is the development of systems for the monitoring of the progress of a case and the build up of costs and for quicker payment to lawyers. Under the arrangements presently in force, once a case has passed the initial merits test the LAB exercises only the most limited control over progress. Costs are not taxed or assessed until the end of the case when it is difficult to assess the value or need of the work which has been done, or to refuse payment to any significant degree. This system also imposes significant financial burdens on lawyers who must wait often very lengthy periods of time before they are paid. This burden has been reduced to some extent by the introduction of interim payment schemes but nevertheless delay in payment remains perhaps the most significant source of dissatisfaction with the legal aid scheme on the part of lawyers.

25. The LCD is therefore devising a system (known provisionally as the Unified Control and Payment System (UCAPS)), which will provide payments on account on the satisfactory completion of discrete stages of a case. The staged approach would also allow the LAB to exercise more detailed case checks than at present, for example by requiring solicitors to confirm that the case still possessed merits.

26. The idea of control or oversight of litigation may disturb lawyers. It is important not to "second guess" the professional judgments of competent and efficient lawyers. To do so would in any case be very expensive. The more one can rely on professional quality, the less burdensome any system of oversight need be and the more straightforward any system of payment by stages. This underlines the importance of the proposals for selection among lawyers.

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Summary

27. The primary issue is affordability. Cost can act as a barrier to private litigants, thus increasing pressure for wider eligibility, and as a burden to the taxpayer through ever increasing total and unit costs. Eligibility for legal aid must be clearly targeted to need in the light of the costs the litigant faces, his ability to pay and the alternative sources of funding available.

28. However, if the taxpayer is to fund wider eligibility, it will be vital to secure demonstrable value for the public money expended. Every effort must be made to make legal aid affordable. This demands improvements in the efficiency of provision of legal services, which could be supported by franchising or by more direct cost/case controls.

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Chapter Three

THE WORK OF THE REVIEW

1. This chapter outlines the research undertaken by the review team. Fuller descriptions are given in Annexes B to F.

2. The review considered eligibility for legal aid in terms of the prospective litigant's need for assistance, that is to say his means in relation to the costs he faces. The team therefore conducted two detailed studies of legal aid data. The first considered the means of applicants for non-matrimonial civil legal aid. The second analysed the costs of cases recently "closed" by the Legal Aid Board (LAB). In each case, the legal aid data was considered in the light of the available information on the wider patterns of means and costs.

Means

3. The most reliable and useful source of information on the spread of means in the population was found to be the Family Expenditure Survey (FES), compiled annually by the Central Statistical Office. Annex B describes how the FES can be used to make a broad estimate of the level of eligibility for legal aid, and also outlines its limitations for this purpose.

4. A further survey was commissioned to obtain more detailed data about the operation of the financial conditions in practice. The survey was based on data from 7935 applications for non-matrimonial civil legal aid, assessed by the Legal Aid Assessment Office (LAAO) at Preston during June 1990. This provided information on the means of applicants for comparison with those of the population as a whole, and on the effect of the allowances used to calculate disposable means for legal aid purposes. The conduct of the survey is described in Annex B, and the key findings in Annex C.

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Costs: legal aid cases

5. The second major survey undertaken for the review was of the costs of civil cases closed by the LAB in September and October 1990. Annex B describes the conduct of the survey, and Annex D the key results.

Costs: unassisted parties

6. Legal aid cases provide the largest and most detailed source of information available about the cost of litigation. However, they are not a complete picture and may not fully reflect the costs of private litigants. Annex E considers the limited amount of information available on the cost of private litigation.

Administrative costs

7. The LAB and the LAAO provided information on the administrative cost associated with processing various stages of a legal aid case. Annex F shows the unit costs and volumes for those processes for which figures were available. These figures were used to assess the administrative implications of the proposals discussed in Chapters 6-9.

General

8. The major work of the review so far has been in collecting information and generating options for change. In doing so, the team has also researched a number of other topics, which are mentioned in the text, and gladly received the views of those who have given them.

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PART II: ALTERNATIVES TO LEGAL AID

Chapter Four

OTHER METHODS OF FUNDING

1. State-funded legal aid is not the only means of financing litigation. Indeed, it has generally been accepted that there would always be a proportion of the population which would not be eligible for legal aid and which was presumably able to fund any litigation by other means. The review looked at a number of alternative sources of funding, some of which already exist, and considered whether any of them could replace legal aid in appropriate circumstances.

2. There seem to be three basic alternatives to legal aid. The first is to fund the case from the litigant's own resources. Many individuals could afford to litigate, subject to a greater or lesser degree of financial sacrifice. Others could do so by borrowing the money (see paragraphs 3-11 below). Secondly, there is the possibility of contingency funding (paragraphs 12-15 below and Chapter 6); indeed, some private cases may already proceed on the basis of informal "speculative funding" agreements between the client and his lawyer. The third broad alternative is insurance. Private legal expenses insurance is discussed in detail in Chapter 5, while paragraphs 16-18 below consider a state-subsidised scheme. Similarly, backing for litigation may also be available through membership of some other body, such as a Trades Union or motoring organisation (paragraphs 19-22).

Loans

3. It is, of course, already open to prospective litigants to make use of credit to fund their case. The question arises whether the wider use of loans could be encouraged. This might be done by the development of a specialised scheme offering loans for litigation purposes or by taking account of credit in the

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financial conditions for legal aid.

Litigation lending schemes

4. A number of Australian banks and financial institutions operate litigation lending schemes, mainly directed at those who are ineligible for legal aid. The main areas in which they appear to be used are family law and business partnership disputes. The schemes all take the form of an arrangement between the bank and individual legal firms, whereby loans can be made to clients of the latter. The loans are usually of a fixed amount at a higher than normal rate of interest. In some schemes, it is the solicitor rather than the client who can draw down the money, which is used to cover disbursements or interim fees. The schemes place a considerable onus on the lawyer, who is responsible for checking both the merits of the case and the financial status of the litigant, and is liable for the loan if the client is unable to repay it.

5. A number of question have been raised about the legal ethics of these litigation lending schemes. In New South Wales, for example, the Law Society has felt the need to revise its practice rules to regulate their use. The main concerns are the possible conflict of interest created by the business relationship between the lawyer and the lender, and the client's lack of control in some of the schemes over how the money is spent. Furthermore, a number of the financial institutions have begun to review the economic viability of their schemes.

6. In 1990, The Law Society in England and Wales considered the possibility of designing a standard litigation loan package. The client, not the solicitor, would be the borrower, but the latter would certify the merits of the case and report on progress to the bank from time to time. However, the Society's discussions with financial institutions revealed a number of problems. The banks were concerned about the high start-up costs of a scheme, including the cost of specialised systems and training. This contrasted with what seemed a relatively small market, with

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limited opportunities for cross-selling. Individual loans would have high transaction costs, especially if the client was not an existing customer. Finally, there was concern about the delay in the drawdown of the loan, normally required within one month. This increased the risk of a material change in the borrower's financial status. As a result, a litigation loan scheme does not appear to be a viable proposition.

Credit and legal aid

7. Currently, the only form of credit taken into account by means assessments is the loan values of life assurance policies. This is a relatively minor factor in practice (see Annex C, Table 6). It is also arguably inequitable, since only policies to which insurance companies assign a value, a declining proportion, are taken into account. The estimated loss to the fund of disregarding loan values would be £134,000; there would be minor administrative savings for the LAAO.

8. It would be possible to take greater account of credit in one of two ways. Both approaches would apply equally to a loan from a specialised litigation scheme, a secured loan, for example on the litigant's house, or any unsecured credit available to the applicant. The first possibility would be to incorporate a notional sum representing potential credit into the eligibility calculation. However, this has the following drawbacks.

(a) Some potential litigants would not be able to obtain credit. The grant of a loan is a commercial decision for the lending institution, which would depend on the creditworthiness of the applicant. This is not simply related to wealth. Past performance as a borrower may be as much a factor as current circumstances and capacity to pay.

(b) In some cases, the costs would outstrip the size of any available loan.

(c) Litigants would not know how much they would need to borrow, or whether they would be able to repay the loan from damages. Some would be deterred. Others could be left with substantial debts.

9. The alternative approach would be to consider the loans that an individual applicant could actually raise. The creditworthy

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would pay higher contributions or become ineligible. However, where credit took applicants above a fixed eligibility limit, there would remain cases where the costs outstripped the loan.

10. Under this approach, it would be necessary to require each applicant to show that they had raised whatever loans they could, and to include these as capital. However, it would be difficult to investigate whether applicants had fully explored their credit potential, so the system could be complex to administer. It would also arguably penalise the thrifty.

11. It would be simpler to bring possible secured loans to account, because the borrowing potential could be more readily identified. However, the same arguments apply to loans secured against property as to other forms of credit: an assessment should consider only loans that could actually be raised. This would not necessarily be the unencumbered value of the property (or some proportion of it), which is simply the maximum possible amount that could be secured in this way. Under the current assessment of resources regulations, an applicant's principal dwelling is treated differently from most other capital assets, because it would not be reasonable to expect him to realise it. It follows that he should not be required to borrow to an extent that could put his home at risk. As with other forms of credit, a responsible lender would limit any loan according to the borrower's creditworthiness, that is his apparent ability to meet the repayments.

Contingency funding

12. Private contingency arrangements between lawyer and client, by which the lawyer is only paid if the case is won, could take a number of forms. In certain jurisdictions, including Scotland, a lawyer might receive only the costs awarded against the other side as his fee in the event of success; this is sometimes known as speculative funding. In other jurisdictions, including some in the United States, contingency fee arrangements allow the

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lawyer to receive an agreed percentage of the award in a successful case as his fee. Another alternative is for a lawyer to receive his normal fee only if the case is successful, plus an uplift to compensate him for the risk undergone.

13. Some arrangements of this kind might be open to the objection that they gave the lawyer an undue financial interest in the outcome of the case. However, this argument is likely to be stronger where the fee is based solely on the size of the award, as with an American contingency fee, than where it is related to the normal fee for the work done. On the other hand, the fees available must be sufficiently attractive to lawyers to justify the risk of losing.

14. In January 1989, the Lord Chancellor issued a Green Paper on the subject of contingency fees. The outcome of this consultation was section 58 of the Courts and Legal Services Act 1990. This provides that the Lord Chancellor may, by Order, specify types of proceeding in respect of which a "conditional fee", based on a prescribed percentage uplift of the lawyer's normal fee, would no longer be unenforceable. The Lord Chancellor has recently consulted on the proposed contents of the Order to be made under s. 58, and is currently considering the responses.

15. The aim of s. 58 is to improve access to justice for potential litigants with appropriate types of case. However, the availability of conditional fees is likely to remain limited, so it would not be possible to treat them as a substitute for particular classes of legal aid. Chapter 6 therefore considers the establishment of a fund, which could offer support to any applicant with a meritorious case, subject to the payment of a contingency fee.

State subsidised insurance

16. Chapter 5 discusses legal expenses cover purchased by groups or individual families. It concludes that such insurance is

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unlikely to be affordable to people at the lower end of the income scale, who will continue to need legal aid. However, there is a further possibility, which would extend legal expenses insurance to cover all those currently eligible for legal aid; it would, in effect, privatise the scheme.

17. The Government would purchase cover for some or all of those currently entitled to free legal aid (possibly defined by the receipt of certain benefits). This would represent a substantial and guaranteed increase in the volume of business, and should enable the chosen insurer to overcome many of the existing problems faced by legal expenses insurance, notably adverse selection (see Chapter 5, paragraph 5). The insurer would thus be well placed to offer equivalent policies to the rest of the population at low premiums.

18. However, in practice this would do little more than transfer the administration of the bulk of the civil legal aid fund to a private concern. Considerable public expenditure would still be involved, and the Government would need to ensure value for the taxpayers' money spent. Insurers would face the same problems of controlling merits and costs which now face legal aid. There is no evidence that they would be better placed to meet them. Furthermore, the Government would need to be certain that there would continue to be companies willing and able to operate a franchise of this kind. If the scheme proved unsuccessful, it would be necessary to reconstruct the machinery of legal aid from scratch.

Other organisations

19. Some Trade Unions and motoring organisations also provide assistance to members involved in litigation. This is a valuable source of funding in many cases, but has little scope as a substitute for legal aid, because help is only available for certain types of proceedings and to a limited range of individuals.

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20. The TUC conducted a survey of affiliated unions on behalf of the review. Information was obtained from unions covering half the total membership. Assistance is usually restricted to work-related matters. It is provided by an in-house legal department or by private lawyers retained by the union. The unions which responded assist about 90,000 members a year. Almost 88% of these cases concern injury at work.

21. The AA offers three legal services to its 7.5 million members. The first is free legal advice on any motoring issue. The second is free representation in a magistrates' court for driving offences. The third is a claims recovery service for injury and other losses following an accident. For a non-returnable fee (£15 or £30 according to the size of the claim), the AA will advise and negotiate a claim, either in-house or through solicitors. If proceedings are required, it is entirely at the Association's discretion whether further financial support is given; this is never done in the case of a small claim. In 1990, the AA received about 34,000 enquiries about this service.

22. The RAC (5 million members) provides a similar range of services. The claims recovery service costs £30, (free to holders of the Club's legal expenses insurance policy). Furthermore, for a £40 fee, the RAC's legal department will pursue a contractual claim concerning a motor vehicle.

Conclusion

23. The most promising potential alternatives to legal aid seem to be the wider use of legal expenses insurance and a contingency legal aid fund. These are discussed in detail in Chapters 5 and 6 respectively.

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Chapter Five

LEGAL EXPENSES INSURANCE

1. Legal expenses insurance (LEI) involves payment of an annual premium to buy cover, in given categories of case, for a claimant's legal costs (including any costs awarded against him), up to a limit of indemnity. Different forms of cover are available for commercial concerns and for individuals and families; this chapter is concerned with the latter type. Family LEI is a common source of litigation funding in a number of foreign countries, notably Germany, but is much less widespread in the United Kingdom.

The current position

2. Legal expenses insurance has been available in the UK for over fifteen years. The market remains small, although it has grown considerably in the last few years. In January 1991, the Consumers' Association and The Law Society published a joint report on LEI. In a survey conducted for this report, 7% of respondents claimed to have some form of LEI. This contrasts with around 50% of households in (West) Germany and 80% in Sweden[4].

3. There are two main types of LEI: free-standing policies, or cheaper, more limited "add-ons" to car or home contents insurance policies. Both usually include access to a free legal advice telephone line. This service is also available to people who do not have full LEI, because it is often included as part of other types of insurance policy. Annex G describes the various types of LEI policy available, and their limitations, in more detail.

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[4] However, this may reflect the different systems or requirements in those countries. In the western part of Germany, LEI centres around a motor based product, due to the lack of comprehensive motor insurance. Furthermore, the market grew at a time when legal aid coverage was very limited. In Sweden, LEI is mandatory, and primarily covers opponents' costs, while a comprehensive legal aid scheme covers own costs.

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4. The Consumers' Association/ Law Society report included a review of the individual policies currently available and a survey of public attitudes about LEI. The experiences of a small number of people who had made claims on legal expenses policies were also analysed. The tone of the report was generally favourable to LEI, but it made a number of specific criticisms. These included:

(a) refusal to renew the policies of some people who had made claims;

(b) unclear brochure or policy wording, particularly in respect of the exclusions from the policy and the applicant's duty to disclose potential legal problems;

(c) short time limits for reporting claims; this is especially relevant where the cause of action is not immediately apparent;

(d) inadequate arbitration procedures.

The Association of British Insurers is preparing a response to the report, which will discuss these criticisms.

5. The major limitation of LEI, however, is that its relatively low volume puts it at risk from "adverse selection", that is the danger that it will primarily be those who anticipate litigation who buy policies. If the market could expand significantly, the greater spread of risk should keep premiums down and limit the need for other restrictions.

6. The main advantages of LEI as a source of private funding are:

(a) it already exists and there seems to be potential for development and growth of the market;

(b) cover for most types of civil case (but generally not matrimonial) can be purchased; certain areas outside the scope of legal aid, such as employment tribunals, can also be covered;

(c) relatively low premiums can buy substantial cover (often up to £50,000 costs);

(d) within the indemnity limit, it will cover any costs awarded in favour of the insured party's opponent.

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LEI and legal aid: a new approach?

7. LEI may already be attractive to those above the legal aid eligibility limits. Many of those eligible for contributory legal aid could also find it worthwhile, although they would have to weigh the cost of continuing premiums and any policy excess against potential liability for legal aid contributions and the statutory charge. This raises the question of whether LEI is a better means of assisting those in the middle income bracket, and if it is, how its use could be promoted.

8. The promotion of LEI faces the fundamental problem that most people do not expect to become involved in litigation; yet insurance requires payments to be made when none is in view. Although in certain circumstances LEI has advantages for a litigant compared with legal aid, (eg. wider scope, lower cost when a case arises), it generally seems unlikely to prove attractive to those who are (or believe themselves to be) eligible for legal aid. Therefore, the logic of a policy focusing on LEI as the means of access to justice for middle income earners would mean that those to whom insurance was available could not be eligible for legal aid, even if they had not in fact insured themselves. It is for consideration whether this would be sustainable in all types of case, eg. serious personal injury.

9. Under this approach, eligibility would be set at a level of means below which current insurance premiums were judged to be an unreasonable expense. For example, present premiums for add-on policies should be within the means of the majority of legal aid contributors. There could be different levels of eligibility for different categories of case, depending on the price and availability of policies, although a complex system with many different levels would be undesirable. Legal aid would remain for types of case which could not be readily insured (eg. serious crime or matrimonial).

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10. A policy of this kind would represent a significant departure from the philosophy of legal aid established by Rushcliffe in 1945. Direct financial assistance from the state would remain the recourse for the poor. However, those of moderate means, who could afford "to pay something but [who] could not face the prospect of being involved in litigation entirely unaided" (Rushcliffe, paragraph 141), would henceforth be expected to make provision for themselves. Civil litigation funding would, for such people and in relevant types of case, be regarded less as a right and more in the nature of a consumer choice. The customer would not only be able to shop around for the best price, but could also select precisely those types of cover which he wanted. Given sufficient demand, different forms of LEI policy from those currently available might be developed, for example insurance against heavy costs in a case that had already arisen. Such a development is already evident on a small scale, in the form of post-accident policies which cover the pursuit of a motoring claim, with a premium linked to the damages recovered.

LEI as a replacement for legal aid: difficulties

11. There are a number of reasons why LEI, as it currently operates, does not represent a fully adequate alternative to legal aid. None of these problems is insuperable, but they would need to be addressed before the approach suggested above could be adopted.

(a) The long term viability of LEI at reasonable premiums is not certain. Most people are reluctant to insure against a contingency which they consider remote, and insurers find it hard to get the spread of risk they need. At present, claims history in the UK is too short and limited to allow firm commercial judgements. The solution can only lie in a significant expansion of volume, coupled with greater control over cases and costs.

(b) Most policies exclude certain types of proceeding which can currently be pursued under legal aid, (although in other areas, such as employment, the scope is often wider). Where broad categories of case were not readily insurable, legal aid would be available. However, it would not be desirable for most policies to include numerous smaller exceptions.

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(c) The control exercised by insurers over the acceptance of individual claims, and the management and cost of cases generally, seem to be limited. Stronger controls (consistent with the requirements of the EC Directive described in Annex G, paragraph 5) would reduce the effect of adverse selection by blocking weak cases and would generally lower costs and therefore premiums. For example, given that many claimants ask for advice on a choice of solicitor, insurers should be well placed to direct their work to those found to be efficient, and develop a degree of price competition between them.

(d) Existing indemnity limits (maximum £50,000 for both sides costs) do not cover the exceptional case. For the cases affected, this represents a major disadvantage, compared to legal aid or the other options considered in this paper. Similarly, refusal to renew the policies of past claimants, although a normal insurance practice, would make it difficult for LEI to replace whole classes of legal aid. Greater volume and stronger control of the progress of individual cases should eliminate the need for blunter instruments of this type.

Implementation

12. At present, LEI to cover the majority of non-matrimonial civil cases is clearly within the means of anyone ineligible for legal aid. Such people would in practical terms lose nothing if eligibility was not widened further in future. This policy could be made explicit, and people encouraged to consider whether they wished to take out insurance.

13. However, before this new approach could be extended to encompass existing contributory legal aid, it would be necessary for the industry to tackle the problems mentioned in paragraph 11 above. This will take time, as it will depend on considerable further growth. However, it might ultimately be possible to extend the policy by freezing or reducing the legal aid limits. It might eventually be possible to set eligibility for many categories of civil case at a level which excluded all existing contributors.

Conclusion

14. LEI already exists, and is generally a worthwhile product. However, its development as a substitute for legal aid along the

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lines outlined by this paper raises the question of principle described in paragraph 10 above. In any event, it also depends on the insurers' ability to tackle a number of problems, which is likely to take a number of years. Chapter 6 examines an alternative scheme for providing widespread financial assistance at no net cost to the taxpayer, but which would not require litigants to take action before their case arose.

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Chapter Six

CONTINGENCY LEGAL AID FUND

1. This chapter considers the principle and viability of a contingency legal aid fund (CLAF), designed to assist individual litigants with their costs, regardless of their means, at no cost to the taxpayer. Litigants who applied for the support of the fund would agree to pay a surcharge if their case was successful, in addition to their own costs (which would normally be recovered from the opponent). The CLAF would use these surcharges to pay the costs of unsuccessful litigants, including any liability for opponents' costs; the fund would also seek to cover its own administrative costs. Surcharges could be levied in a number of ways, notably a non-returnable fixed fee paid at the outset or an agreed percentage of any damages recovered. The CLAF could be administered alongside the ordinary legal aid fund by the Legal Aid Board.

Background

2. A scheme of this kind was first advocated by Justice in 1966, and was worked up in more detail in 1978 as part of the organisation's evidence to the Royal Commission on Legal Services (Benson). Benson rejected the idea, expressing doubts about the principle of successful litigants subsidising the unsuccessful and the financial viability of the scheme. It was also concerned that the scheme, which was limited in its application, was merely a palliative which would delay improvements to the legal aid system itself. However, this paper recognises that a CLAF may be feasible for some types of case but not for others, and that the availability of legal aid for each should reflect this.

3. The Law Society revived the idea of a CLAF in 1987 in its consultation paper "Improving Access to Civil Justice". This envisaged a scheme that was independent from the Legal Aid

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Administration and the Government. The Society abandoned its initial proposal in 1989, primarily because the necessary initial funding could not be provided privately, but invited the Legal Aid Board and the Government to reconsider the Justice proposals.

CLAF in other jurisdictions

4. The only existing example of a working CLAF operates in Hong Kong. It was set up in 1984 as an adjunct to legal aid, backed by a one million dollar loan facility from the State Lotteries Fund; in the event, HK$400,000[5] was needed. Income began to exceed expenditure in March 1987 and the loan was paid off during 1988. Up to November 1990, there had been 297 successful applications to the scheme, representing 67% of all decided applications; this compares with 22% refusals on merits by the Legal Aid Board in 1989/90. The rigour of the Hong Kong merits test is also illustrated by the remarkable success rate (achieved in the absence of legal aid costs protection rules); damages had been obtained in 95 of 97 concluded cases. A total of HK$1,586,831 had been retained by the fund, which stood at HK$1,016,497.

5. The scope of the scheme is limited to plaintiffs in personal injury cases (excluding medical negligence) claiming in excess of the High Court lower limit of HK$60,000 (c. £4,000). Successful plaintiffs are required to pay 10% of the first $50,000 they recover, 12.5% of the next $200,000 and 10% of any excess. These percentages are reduced if the case settles, depending on the stage reached.

6. In Western Australia, the Law Society is in the process of establishing a "Litigation Assistance Fund", backed by grants from the Public Purposes Trust and the Lotteries Commission. The fund is intended to become self-financing on the basis of a "Fund Fee", which will initially be set at 15% of the award; an initial

[5] There are about HK$15 to the pound.

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contribution may also be required depending on the means of the applicant. Applications will be considered against four criteria: the need to maximise the fund's return, a preference for good prospects of success, the applicant's means and the desirability of supporting cases of general importance. As a result, most cases will be those issued by plaintiffs seeking monetary relief. The initial grant will allow the fund to support about 100 cases in the first year. New South Wales and South Australia have begun to investigate the possibility of similar schemes.

Advantages of CLAF

7. A viable CLAF could offer financial support to any litigant who had an arguable claim and who might otherwise be deterred by fear of the costs. It would do this at no net cost to the taxpayer and without putting the opponents at the costs disadvantage imposed by legal aid.

8. A CLAF avoids the major drawbacks of private contingency fees. Some contingency arrangements can be seen as giving the lawyer an undue interest in the outcome of the case. They also give the unsuccessful litigant no protection against opponents' costs. This risk is arguably the major deterrent against taking legal action.

9. It may be possible for a self-funding CLAF to replace existing legal aid in certain circumstances (see paragraphs 27-30 below).

10. If the fund was able to cover its costs (including administrative costs), it would not be necessary to restrict availability in terms of applicants' means. On the contrary, the fund could support any case with good prospects of success. There would therefore be no need for a means test, so a CLAF case would be correspondingly cheaper to administer than a legal aid case.

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Arguments against a CLAF

11. **It might be thought wrong in principle to expect successful litigants to subsidise the unsuccessful.** In general a CLAF could be characterised as a form of mutual insurance against the risk of losing a case. However, this analysis becomes questionable when the "premium" consists of a percentage deduction from damages, which is a pragmatic approach, taking advantage of the sums available to successful litigants. The premium is paid after the event, and its size bears little or no relation to the risk the case involved. However, the litigant could choose whether or not to use the fund, in full knowledge of what the percentage deduction (if not its actual value) would be.

12. It might be thought wrong in principle that successful parties should have to forego a proportion of their recovery to finance their case. The recovery of money, by way of damages for example, is intended to compensate for a loss. If a litigant is denied full recovery, it could be said that he has been denied a legal right and has not been adequately compensated. On the other hand, a litigant faced with risking his own money, or recovering nothing if he felt unable to take that risk, might well find a CLAF arrangement acceptable.

13. Ultimately, the acceptability of the CLAF principle is likely to depend on the size of the fees and deductions necessary to maintain a viable fund.

14. **Litigants with good prospects of success would decline to use the scheme, putting its financial viability in jeopardy.** With a CLAF, successful litigants face a larger bill than legally aided or unassisted parties (who recover their costs). Therefore, using the scheme becomes less attractive, the more confident someone is of victory. As a result, fewer applicants with strong cases would apply, leaving the scheme with a high proportion of weaker cases. This is another example of the problem of adverse selection. The greater the proportion of losing cases, the higher

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the surcharges needed to maintain the fund. If there were too many losers, the necessary charges would not be reasonable, and in that sense the fund would not be viable.

15. Annex H estimates the charges likely to be necessary to support a CLAF scheme covering all types of non-family civil litigation. It incorporates assumptions to allow for the effect of lower success rates than under existing legal aid. However, the scale of any adverse selection in practice can only be guessed at, so the true surcharge rate would only emerge when a scheme began to operate.

16. Although a CLAF would ultimately be self-financing, some initial funding would be required while it established itself. This would sustain the CLAF against the possibility that some of its first cases were lost, before sufficient money had accrued to cover their cost. Money would also be needed if payments on account were made in the early stages.

17. **It may not be possible for a CLAF to cover all classes of case.** The types of case which can be covered will depend on the form of surcharge used. A deduction from damages is best suited to significant money claims, although it could also be applied to counterclaims. The non-returnable fixed fee approach depends on costs being recovered from the opponent in the majority of successful cases. If the fee is not needed to offset the assisted litigant's own costs, it can contribute to the fund. Neither approach could cover matrimonial or other family suits, where damages and costs are rarely awarded. The fixed fee system is further limited to an amount that litigants could reasonably afford at the outset of a case.

18. The rest of this chapter considers a scheme which uses both forms of funding, in order to cover plaintiffs and defendants in all classes of case. However, fixed fee cases are on average unlikely to recoup their full cost, while some types of proceeding have more favourable profiles of costs and damages

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awards than others. This raises the issue of cross-subsidisation. Winners will of course subsidise losers, under the mutual principle. In addition, plaintiffs would tend to subsidise defendants because of the type of funding used; personal injury victims would subsidise litigants in other types of case, because they are awarded damages and costs more frequently. It would be possible to reduce, but not eliminate, these cross-subsidies, by setting differential fees and deduction rates.

19. It could also be said that less well off successful litigants would subsidise richer losing ones, because a CLAF takes no account of means. Furthermore, the better off would be more likely to exercise adverse selection. They could afford to risk proceeding privately if they had a strong case, but may otherwise be quick to take advantage of the risk free litigation possible with a CLAF. It may therefore be appropriate to set a (fairly high) upper eligibility limit for the scheme, (probably based simply on gross income).

20. **A CLAF imposes little or no discipline on litigants, in terms of weighing prospects against the cost of their case; for some, it represents virtually risk free litigation.** It is argued in Chapter 7 (paragraphs 5-9) that a contributory system, by requiring litigants to risk their own money, encourages them to take a realistic view of their case and its conduct. Under a CLAF arrangement, a plaintiff who fails to recover damages need pay nothing, while a fixed fee, paid at the outset of a case, may have little or no effect on the litigant's subsequent behaviour. However, the viability of the fund could be threatened if weak cases are admitted and there is insufficient monitoring and control of costs. The Legal Aid Board's machinery for assessing merits and scrutinising the subsequent progress of cases would be required for CLAF as much as ordinary legal aid cases.

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Calculation of surcharge

21. It would be possible to cover all types of non-family civil case, by operating a mixed scheme. Where money is claimed, the surcharge could be based on a percentage deduction. In other cases, a fixed fee would be taken. In any given class of case, applicants would not have a choice between fixed fee or deduction, as this could allow them to select the more favourable one against the interests of the fund. Annex H estimates the level of charges likely to be needed to sustain a fund on this basis.

22. Deductions could be made from all monetary awards, above a certain minimum value (say £500). Where the full costs of a successful plaintiff were not recovered in full from the opponent, the plaintiff could be required to make up the shortfall from his damages in addition to the percentage charge. It is also for consideration whether:

(a) there should be a lower deduction rate to encourage settlements, or

(b) a sliding scale of deductions to protect low awards, or to limit the contribution of very large winners, or

(c) different rates for different types of proceeding, to reduce cross-subsidisation; and whether

(d) the deduction should be based on damages awarded or damages recovered.

23. Money claimants who failed to recover damages would not be liable for a deduction. Therefore, in order to retain some contributory element, they would be required to pay a fixed fee at the outset as a minimum contribution. This would be offset against any surcharge that was subsequently made. The fee would be smaller than that paid by fixed fee litigants, who would not be subject to any further payment if they won.

Case control and administration

24. Applicants would need to satisfy a merits test, since the

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viability of the fund would depend on there being more winners than losers. The test would consider both prospects of success and the likelihood of recovering costs and damages. The test should be operated rigorously in order to limit the effect of adverse selection.

25. The Legal Aid Board would also operate procedures to monitor progress of cases, control costs and make payments on account. The rules would prevent successful applicants to the scheme from withdrawing, if it became clear that they would win, in order to avoid the surcharge. Bills to be paid by the fund would be taxed or assessed on the same basis as applied to legal aid.

26. It would be necessary for the CLAF to cover its administrative costs. The cost of processing a CLAF case would be lower than that for legal aid, because there would be no means test and fewer contributions to handle. Annex F suggests an average cost of about £23 per case. All applicants would pay an additional fee to cover this cost.

Relationship to legal aid

27. Although a CLAF is primarily intended to assist those ineligible for legal aid, it could also replace legal aid in certain circumstances and so reduce the burden on the taxpayer. The CLAF could be extended to anyone eligible for legal aid with a contribution commensurate with the initial fees required. If no initial fees were charged, the CLAF could be extended to all plaintiffs with money claims, including those who would qualify for free legal aid under the existing arrangements. However, a deduction from damages might be harder to justify in respect of litigants of very low means.

28. If the legal aid scheme remained in its present form, there would be nothing to stop those who were eligible from using the non-means tested CLAF instead. Their choice is likely to depend on the level of contributions payable under each system, and their degree of confidence about the outcome. Likely winners

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would do better to choose legal aid. Those less sure of their prospects might prefer CLAF, if their legal aid contribution was higher than the non-means tested CLAF fees. The net result could be a shift of existing weaker legal aid cases to the CLAF, imposing on it an additional liability for opponents' costs.

29. The arguments in paragraphs 27 and 28 above suggest a scheme which dovetails eligibility for legal aid and CLAF fees. Eligibility would be set at a level at which the maximum contribution was lower than the initial fees payable under the CLAF. Those who qualified for legal aid would therefore be unlikely to find the CLAF attractive. This approach suggests different levels of eligibility for cases paying a full fixed fee and those funded by a deduction from damages. Alternatively, eligibility for all cases could be linked to the higher figure, at the cost of some adverse selection between legal aid and the CLAF.

30. Several factors affect the level at which the fixed fee and the maximum contribution should be set. The higher the fee, the less scope there would be for savings in respect of existing legal aid. On the other hand, the fixed fee cases in the scheme would come closer to covering their own costs, so the deduction in damages required in other cases would be correspondingly less. Finally, unlike a contribution, a fixed fee would be non-returnable. Therefore, although means tested, a very high fee might be considered unreasonable to charge even relatively well-off applicants, as it would more often be disproportionate to the costs of the case. Annex H assumes a fixed fee of £300.

Conclusion

31. The calculations in Annex H suggest that a CLAF scheme for non-family litigation would be viable on the assumptions that: fees for defendants or non-money claimants was about £300; deductions were set at 25-30% of money recovered in other cases (with a down payment of say £100); there would be an application

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fee of £25. Eligibility for contributory legal aid in the relevant types of case could reflect these charges.

32. The scheme would be an effective means of helping people face the costs of litigation, without penalising their opponents. However, it would inevitably involve a considerable element of cross-subsidisation of losers by winners, defendants by plaintiffs and, for example, litigants with contractual disputes by injury victims. The proposed fee structure could be refined to reduce but not eliminate this.

33. For many, the scheme would make litigation almost entirely risk free. Rigorous controls would still be needed to prevent litigation of little intrinsic value, conducted with no regard to cost, which could inflate litigation costs generally. Chapter 8 considers approaches to widening eligibility, which place greater emphasis on the contributory principle, and therefore on the litigant's responsibility to consider the value for money of his case.

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Chapter Seven

MODIFICATION OF THE EXISTING SYSTEM

1. This chapter discusses a number of possible reforms of the existing legal aid system, several of which are also relevant to the more radical proposals, discussed in Chapters 8 and 9. This chapter covers:

(a) the criteria which inform the financial conditions, and the implications of these for setting and uprating the upper and free eligibility limits;

(b) options for a more cost-effective contributory system;

(c) simplification of the means assessment procedure.

The financial conditions

2. Chapter 2 (paragraph 9) suggested that the financial conditions for civil legal aid should encourage litigants to attach a realistic priority to their cases. The Lord Chancellor's Advisory Committee on Legal Aid (LAAC) reached a similar conclusion in its review of eligibility in 1983/84 (paragraphs 257-259). It suggested that financial criteria were necessary to reflect the fact that legal aid was "unusual among public services in that, on the one hand, it is an essential instrument for guaranteeing civil rights, yet on the other hand, it is an instrument whose use should be discouraged except where absolutely necessary".

3. The LAAC concluded that "taxpayers generally should not be required to subsidise those who make use of the scheme to an extent greater than is necessary for the scheme's primary objective", ie. "to ensure that people are not deterred by lack of means from pursuing their legal rights".

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4. Therefore, the financial conditions could be said to have two functions. The first is to direct assistance to those with the greatest need. The eligibility limits define those who are and are not judged to require assistance from public funds, including those who can pay nothing themselves. The contributory system ensures that those who can do so pay a reasonable sum towards the cost of their case. This in turn recoups money for the legal aid fund, in order to limit the total burden on the taxpayer.

5. Contributions also have the less obvious function of providing assisted parties with a measure against which to weigh the value of their case. They provide an incentive to assisted litigants to make similar judgements to private clients about the importance of commencing a case. Litigants prove that they are serious, by putting down their own money.

6. A similar measure of importance does not exist for free legal aid. Where a benefit is free, people are likely to use it freely because they lose nothing by doing so. It is notable that a much higher proportion of people eligible for free legal aid apply for it than those who would have had to pay something (see Annex A, Table 4). This raises the further question of whether all assisted persons should be required to pay something, however small, towards the cost of their case (see paragraph 24 below).

7. Once a case has commenced, realistic decisions are also needed about whether to accept a settlement or abandon the case. Some solicitors have commented that legally aided clients are less willing to accept advice to settle, preferring to fight "on principle", whereas private clients are likely to review the worth of their case from time to time when further payments fall due. However, the scope of the existing system of legal aid contributions for promoting more reasonable behaviour in this respect is limited. Subject to any reassessment, the assisted person's liability is fixed at the outset. Therefore, having paid his contribution, he might as well fight the case to the end. On

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the other hand, the private client's potential liability increases, the longer the case proceeds.

8. Finally, it can also be argued that litigants will take a greater interest in the conduct of the case when they can see that their own money is at stake. The assumption is that litigants would try to ensure expedition and economy, in order to obtain value for their own money. However, litigation is likely to be a once in a lifetime purchase, and in practice few litigants would have the necessary information or understanding of legal procedures to question the conduct of their case. This emphasises the importance of ensuring that good quality practitioners are selected at the outset.

9. To summarise, contributions should be such that litigants are "not deterred" by lack of means, but this does not mean that money should be no object. Rather, litigants should be encouraged to think twice about their litigation.

Eligibility limits

10. The free limit defines the level below which people are deemed unable to afford any expenditure on litigation. The availability of assistance to the most needy remains a central principle of the legal aid scheme, intended to ensure that people are not unduly "deterred by lack of means from pursuing their legal rights". About 80% of successful applicants for civil legal aid certificates are not required to pay any contribution. Free legal aid represents about 80% of net expenditure, or £59.3m in 1989/90. Therefore, the taxpayer has a significant interest in whether, and to whom, free legal aid is awarded. So too does the unassisted party (see Chapter 2, paragraph 6).

11. The free limit is normally uprated each year in line with the uprating of income-related social security benefits, that is by RPI exclusive of housing costs (which are allowed separately). Recipients of Income Support are automatically granted free legal

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aid. However, there is a case for linking the free limit more directly to social security benefits. The free limit effectively represents a personal allowance for the applicant's basic upkeep; (this is clearest in contributory cases). In 1990/91, it was 38% higher than the single person's Income Support allowance of £36.70 per week. A formal linkage to this figure would make the criterion for fixing the free limit clear. The exact relationship will need to be considered.

12. The upper eligibility limit defines a level above which it is deemed that people do not require financial assistance with litigation. Chapter 2 (paragraphs 10-11) argued that such a system can not effectively target need. The range of cost in litigation means that some relatively well off people may require assistance with more expensive cases. This problem cannot be tackled by any approach to defining and uprating a fixed upper limit which considers only applicants' means, for example a multiple of the lower limit or a percentage of the population. Chapter 8 discusses three options for restructuring legal aid so that it would not involve an arbitrary upper limit.

Contributions

13. Contributions should represent an amount that the assisted litigant can reasonably be expected to spend on litigation. They should also seek to place the assisted person in a similar position to a private client. However, the degree to which this is possible is limited. First, the amount that a private client is prepared to spend on litigation is likely to vary from individual to individual and from case to case. On the other hand, at any level of means, legal aid contributions would be the same for all cases which passed the merits test. It would be extremely difficult to reflect complex private judgements in legal aid regulations. If this were done, the anomalous result would presumably be smaller contributions in less "important" cases. Secondly, private litigants are faced with a potentially open-ended commitment (if they are to pursue their case to the

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end). The liability of the assisted party will in some way be limited.

14. The amount which an assisted litigant can afford to spend cannot be precisely quantified. Nevertheless, the contributory system should put litigants of different means at risk of broadly the same relative expense, so as to face them with a similar judgement about worth. However, the resources of many people are variable according to their financial priorities. Decisions to spend savings, borrow (often against house values) or forego other expenditure reflect complex choices, which cannot readily be captured by the means assessment process. The legal aid financial conditions should not push applicants to the limits of their potential resources, but neither should they relieve them of the need to make choices.

15. Contributions are currently set at 25% of disposable income above the free limit and 100% of capital. Paragraph 14 suggests that the fraction should require the applicant to make choices. Annex C (paragraphs 9-10) compares legal aid contributions for different income groups with expenditure on an illustrative selection of leisure items. This suggests that a higher fraction of disposable income would not present an unmanageable burden for many existing contributors.

16. The fraction should also reflect the approach taken to means assessment and allowances (see paragraphs 31-33 below). If (as now) allowances were made for all reasonable commitments as well as basic living expenses, the remainder would be available for discretionary expenditure, including litigation. This suggests that a relatively large fraction (say 50% or more) could be set. On the other hand, if disposable income had to cover everything but the basics, a somewhat lower figure would be appropriate.

17. The 1983/84 review proposed a sliding scale of contributory fractions. This would take increasing proportions from higher bands of income, to ensure that applicants paid as much as they

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could. The legal aid fund would benefit from additional contribution income at no extra administrative cost. By way of example, a scale of 33% for the first £1000 of disposable income above the lower limit, and 50% of the remainder up to the eligibility limit would produce approximately £1.1m in additional contributions retained by the legal aid fund.

18. Chapter 8 discusses options for removing the fixed upper limit, and favours a system of safety net legal aid. In these circumstances, a sliding scale would have greater effect, and would reflect the ability to pay of the relatively well off litigants who would become eligible. If this was combined with the approach to means assessment discussed in paragraph 32(a) below, a suitable scale might be 25% of the first £2000 disposable income, 40% of the next £2000, 60% of the next, 80% of the next, and 100% of disposable income above £8000. The effect of such a scale is shown in Annex J (Table 2).

Continuing contributions

19. Since the establishment of the civil legal aid scheme, a contribution has been required in respect of one year's income, regardless of the length of a case. Rushcliffe linked the contribution period in a general way to the time a case might be expected to last. However, the average length of legal aid cases in the survey of closed cases (see Annex D) is in fact about two years. The 1983/84 review argued that the one year limit should be retained, as the uncertainty of an open-ended contribution would deter litigants.

20. On the other hand, in 1986 the Legal Aid Efficiency Scrutiny recommended that monthly contributions from income should continue for the duration of the case. This would reflect the ability to pay and provide an incentive to conduct cases with expedition. Rules of court include procedures which would allow litigants to prevent their opponent from causing delay in order to inflate costs.

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21. This proposal would be consistent with the objective of placing the assisted litigant in a position similar to that of a private client, who cannot be certain about the length and cost of his case. An assisted person would nevertheless be in a more favourable position than a private client, because although he would not know the final total of his contribution, he would at least be certain that it was limited to a reasonable sum in terms of his means. It is estimated that the additional income from existing contributory cases would be £1.8m.

22. However, there could also be substantial additional administrative cost. Procedures would be required to uprate the annual contribution, and there would be more frequent reassessments of both income and capital. The 1986 scrutiny suggested that a full reassessment should be conducted each year. It was estimated that this could require 453 or 186 additional staff in the Legal Aid Assessment Office (LAAO), depending on whether originally free cases were included. In order to reduce this administrative cost, in most cases the original contribution could simply be uprated each year, to keep it broadly in line with inflation. However, the litigant would be required to apply for a full reassessment where there had been a significant change in his financial circumstances.

23. If a litigant could afford to make regular contributions from income throughout the life of a case, he could afford to do so until the total net cost of a case had been recouped. Contributory legal aid would effectively become an interest free loan. This would considerably reduce the net cost to the taxpayer of contributory, non-matrimonial legal aid (c. £17.1m in 1989/90). However, it could be thought an unreasonable deterrent to extend contributions for what in some cases would be a very lengthy period, while there would be no additional advantage in terms of litigants' behaviour. Finally, the administrative cost would again be considerable, not only for uprating, collecting and reassessing contributions, but particularly for enforcement, if as seems likely many litigants would prove reluctant to make

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further payments once their case has been completed.

Nominal contributions

24. Paragraph 6 above suggested that there could be some benefit in requiring all legally assisted litigants to make some contribution, however small, towards the cost of their case. However, for many of those currently in receipt of free legal aid, it would be difficult to identify a sum which would avoid hardship on the one hand, and tokenism on the other. There would be administrative cost involved in collecting and enforcing small contributions in a large number of previously free cases, but little additional income would be generated. For example, a contribution of £10 or a non-returnable fee of £5 would produce about £500,000.

Minimum contribution

25. In 1983, a joint LCD/DSS scrutiny of the means assessment procedures recommended that very small contributions should be waived since they were not worth the cost of collection. The evidence collected by the review confirms that small contributions are not cost effective. About £100,000 per annum is retained from 5000 contributions below £100, at an additional administrative cost of £16 per case (see Annex F) or £80,000. The equivalent figures for the 2500 contributions of £50 or less are £25,000 income at £40,500 cost. However, waiving small contributions could generate a further cost to the legal aid fund, in respect of additional cases where offers of legal aid are currently refused; this would amount to around £200,000 in respect of offers under £100, or £75,000 for £50 offers.

Non-returnable contributions

26. In 1978, the second report of the LAAC's Financial Provisions Working Party raised the possibility of making legal aid contributions non-returnable, even if they exceeded the net cost of the case to the legal aid fund. This would reduce the administrative cost of accounting for, and recycling a large proportion of, contributions received. The additional income

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could subsidise other aspects of the scheme. Litigants would not be deterred, as they would still face a fixed and predetermined liability.

27. However, the cross-subsidisation between litigants inherent in this proposal raised a question of principle which the 1978 report did not feel competent to address. Chapter 6 (paragraphs 11-13) considered such subsidies, in the context of a contingency legal aid fund, intended to be fully self-financing. Non-returnable contributions represent a more limited application of a similar concept: about £4,000,000 is currently received and returned. However, with a CLAF, the cross-subsidy is broadly related either to the cost of cases through a non-returnable fixed fee, or to their value via a proportion of damages. A non-returnable contribution would relate solely to the means of the litigant. As a result, substantial contributions, particularly from capital, could be taken in respect of very cheap or abortive cases. This suggests that some mechanism would be required to limit the retention in terms of the cost of the case, which could in turn eliminate many of the administrative savings associated with the proposal.

Administrative fee

28. Paragraph 24 above rejected the proposal of nominal contributions from all assisted litigants. For the same reasons, it would not be feasible to charge all applicants for legal aid a fee to cover the administrative costs of handling a case. Any such fee should be related to the ability to pay, and therefore to the contributory system as a whole. Otherwise, the fee would simply reduce the amount of money available to pay for the litigation. A proposal made in the 1983 scrutiny and supported by the LAAC would achieve this. Contribution in excess of the legal costs of a case would be retained up to the value of an administrative fee. Annex F suggests that the fee would be around £50.

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Means assessment

29. Means assessment is necessary both to determine an applicant's eligibility for legal aid and to fix the contribution, if any, he should pay. Under the present system, the disposable income and capital of an applicant is calculated by the LAAO, on the basis of information provided by the applicant and his employer, by applying a number of statutory and discretionary disregards, allowances and other adjustments. The calculations involved can be extremely detailed and complex.

30. This high degree of detail and precision is intended to ensure fairness between applicants. So far as contributions are concerned, however, precision simply makes a marginal difference to a figure which represents a judgement about what litigants could be expected to spend, rather than a very exact calculation of what they could afford (see paragraphs 13-14 above). The assessment calculations have greater significance in terms of eligibility because of the fixed upper limit. But fairness and consistency could be achieved equally well with a simple as a complex system.

31. The simplest possible approach would be to consider only the gross income of an applicant. This has the advantage of giving, on an immediately comprehensible scale, an impression of people's broad financial standing, which could be used to identify in a rough and ready way those who Rushcliffe (paragraph 141) said "cannot on any reasonable view be regarded as appropriate subjects for State aid at all". However, a system of allowances often produces different outcomes for applicants with the same gross income (see Annex C, paragraph 3). This suggests that some individual allowances will be needed, in order to reflect adequately the ability of applicants to pay their contribution towards the case.

32. There are two possible approaches to defining the factors which should be allowed.

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(a) Allowances could be restricted to types of expenditure which are unavoidable in the strictest sense. This would include any legal obligations such as tax. It would also cover expenditure which is clearly essential to sustain a household, notably the basic cost of housing and maintaining an applicant and family. These are currently covered by dependants' allowances, the free limit and the allowance of housing expenditure. Ideally under this approach, only a standard allowance would be made for housing which would reflect the average cost of a basic standard of housing (possibly on a regional basis). If this was not practicable, the actual expenditure could be made subject to a maximum allowance.

(b) Allowances could cover expenditure which the applicant could have chosen not to incur. This could include any expenditure to which the applicant was committed at the time of the application, or which could not reasonably be deferred, for example private school fees and credit repayments, as well as actual housing expenditure.

33. The present system broadly reflects (b). Many commitments are usually allowed under the assessment officer's discretion. However, the treatment is not wholly consistent. Thus, most credit and hire purchase instalments are considered to fall within the free limit. However, repayment of loans for home improvements are allowed, as are planned repayment of debts including hire purchase arrears. Expenditure on a second home, presumably unavoidably committed for all practical purposes, is allowed if the applicant has a "good reason" for living away from the main family dwelling. In other words, there is an attempt, not explicitly defined, to judge the merit of different types of expenditure. Generally, the approach at (b) might be thought to be inequitable between applicants who had chosen to spend (or save) in different ways.

34. Annex K discusses the factors considered under the current procedures in more detail, with a view to developing a much simplified system as part of the proposal for "safety net" legal aid, discussed in Chapters 8 and 9. However, many of the recommendations in Annex K could be adopted in any event. Simplification could save administrative cost, and should make the process more understandable by applicants. In essence, allowances would be restricted to factors in category (a) of paragraph 32. Other commitments, that is those taken on by

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choice, would be deemed generally to be covered by the free limit and the contributory fraction.

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Chapter Eight

ELIGIBILITY RELATED TO CASE COST

Introduction

1. At present, eligibility for legal aid is related solely to means and the limit is a fixed one. This can create difficulties for those above the limits who are faced with particularly expensive litigation or who fear that their case might prove to be an expensive one. On the other hand, people with cheaper cases within their means may receive legal aid. Such cases represent an unnecessary burden to the legal aid administration, and possibly to the assisted person's successful opponent who may not be able to recover his own costs in full. Annex D (paragraph 13) estimates that the litigant's contribution exceeds the gross cost of his case in approximately 18% of contributory cases. Chapter 2 (paragraphs 10-11) argued for an approach to eligibility which focused on "need". This chapter examines the options for achieving this.

2. Three approaches to wider eligibility are considered:

(a) universal eligibility for legal aid, coupled with high contributions from the better off;

(b) discretion to waive the upper eligibility limit, when cases seemed likely to be expensive; and

(c) a safety net legal aid scheme, which would only operate when a case proved to be beyond the means of the litigant.

Cost of wider eligibility

3. All three options are based on the contributory principle, so that the legal aid fund would only meet the costs of cases in excess of any recoveries and the means-related contribution. All new cases where this occurred would represent an additional net cost to the fund. On the other hand, the scope for savings is limited, as the existing cases where the contribution exceeds

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the costs cause little or no net cost to the fund.

4. Annex J estimates the scale of the additional cost of a safety net scheme. Other things being equal, the cost of the other options would be roughly the same. In any event, the key assumption in the costing is the propensity of better off people to litigate under the new scheme. A variety of factors will affect this, including the wealth of the people involved and the structure of the option adopted. For example, the possibility of greater liability for opponents' costs under a safety net scheme might discourage some potential litigants. In so far as it did, the additional cost of the scheme would be reduced. However, Annex J assumes that as many of those eligible under the new scheme would litigate as those eligible for contributory legal aid do currently.

5. Annex J also incorporates the effect of two of the proposals discussed in Chapter 7: contributions continuing throughout the life of the case and a sliding scale for the contributory fraction. The collection of larger contributions in all cases helps to offset the additional cost of wider eligibility.

Criteria affecting the choice of option

6. The balance between the three options listed in paragraph 2 above will depend on the degree to which each fulfils the following objectives.

(a) To facilitate access to justice, by providing financial assistance to litigants who require legal representation and who could not otherwise afford to proceed.

(b) To ensure that those who could afford to proceed themselves are not deterred by fear or uncertainty about the outcome and the possible costs.

(c) To limit the burdens to which unassisted opponents of assisted parties are subject, by confining the protection against costs provided by legal aid to those who need it.

(d) To keep the administrative effort involved to a minimum, for example by eliminating unnecessary grants of legal aid.

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(e) To promote so far as possible responsible behaviour on the part of litigants, so as to help secure value for the money spent on legal aid.

Universal eligibility

7. Under this option, there would be no, or a very high, upper eligibility limit for legal aid. The greater ability to pay of many applicants would simply be reflected by their larger contributions. These could be assessed on a sliding scale, (see Chapter 7, paragraphs 17-18). The contributions would partly offset the additional cost to the legal aid fund, so that net assistance would be approximately matched with need.

8. The abolition of the upper eligibility limit was recommended by Benson in 1979, but rejected by the LAAC in its review of eligibility in 1983-84. The major drawback with this proposal relates to the fact that well-off individuals could apply for legal aid, whatever the likely cost of their case. Many might choose to do so, in order to "insure" themselves against exceptional expense. This would lead to substantial additional administrative cost, much of it unnecessary. Litigants could also benefit from partial protection against opponents' costs. It follows that this option does nothing to exclude the existing cases which are within the means of the litigant but which nevertheless receive legal aid. It would also lead to many more cases in which both parties were legally aided. This would reduce the proportion of its costs which the legal aid fund could recover from the other party.

Flexible upper limit

9. This proposal also offers assistance to people of larger means, but attempts to restrict it to those who face particularly high costs in order to reduce the administrative burden inherent in universal eligibility. The Legal Aid Board (LAB) would have the discretion to waive the upper income limit in cases where costs seemed likely to be higher than the means of the applicant.

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A contribution could then be calculated on the existing basis. A similar discretion already exists in respect of capital.

10. However, accurate prediction of the final bill would be difficult. Chapter 2 (paragraphs 15-16) argued that there is scope for lawyers to improve their ability to predict the level of cost which their client might face. However, such advice can quite reasonably be in terms of a range of possible figures, depending on different outcomes. An inherent uncertainty will always remain in litigation, because a case could settle at any stage from a threat to issue proceedings to a full trial. The LAB would have to make this judgement at the beginning of a case, on the basis of information from an applicant who would have a considerable incentive to exaggerate his likely costs.

11. It is therefore unclear how a flexible income limit would operate in practice. If estimates were based on the worst case, (ie. the likely cost if a case went to a full trial), many applicants would receive legal aid unnecessarily. To this extent, the problems of the universal approach would still apply.

12. Alternatively, the discretion might be exercised only in very clear cut cases, as currently appears to be the case in respect of capital (see Annex C, paragraph 7). This raises the question of how to treat initially unsuccessful applicants whose cases turned out to be expensive. They would presumably be permitted to reapply at a later stage and the costs they had already paid could be treated as part of their contribution. In this case, they would effectively be in the same position as applicants under the safety net scheme proposed below.

Safety net

13. Litigants would begin their cases privately, making arrangements to pay their solicitor in this capacity. They would receive legal aid if (and only when) the actual costs exceeded a level commensurate with their means. This option eliminates

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grants of legal aid in cases within the litigant's own means, but avoids the problems involved in attempting to predict the cost at the outset. As an unassisted party, the unsuccessful litigant would be liable in the ordinary way for his opponent's costs incurred before the date of the legal aid certificate. Thereafter, the legal aid costs protection rules would operate. The detailed operation of a safety net scheme is considered in Chapter 9.

Advantages

14. A safety net would have the following advantages. The existence of a safety net would benefit those who are currently ineligible for legal aid, and who may be deterred from litigating by the possibility of exceptionally high costs, while targeting actual assistance on cases of demonstrable need.

15. On the other hand, it would not entirely eliminate the discipline of cost. Potential users would be liable for the full costs of successful opponents incurred prior to the grant of legal aid. This would reduce the burden faced by the unassisted opponent and emphasise the litigant's own involvement and direct financial stake in the case. However, although preferable to the position faced by a fully private litigant, this potential liability involves an element of uncertainty greater than that represented by own costs which are circumscribed by the spending limit, and could represent an unreasonable deterrent against litigation unless it was related in some way to the ability to pay. Paragraph 23 below argues that in most cases such a relationship would exist.

16. A safety net spending limit could be a more effective mechanism than a legal aid contribution for encouraging litigants to take realistic decisions about whether to proceed (both at the outset and as the case unfolded) and to take a greater interest in controlling progress (see Chapter 7, paragraphs 5-8). As a private client, paying his own money directly to his solicitor, the litigant might feel in a stronger position to question the

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conduct of the case. Furthermore, his potential liability would not be limited to a fixed sum, but would continue to accrue in the form of potential opponent's costs. This should provide an incentive for expedition.

17. Initially, litigants would be able to avoid the application and other procedures associated with legal aid and the additional time and cost that these inevitably require (see Annex E, paragraph 9, question 2). Solicitors would negotiate their own payment arrangements, and could generally expect to receive some money more quickly than at present.

18. Cases where contribution exceeded costs could be excluded altogether, including those which receive legal aid under the current system. There should therefore be significant administrative savings (see Annex J, paragraph 14).

19. Both sides would be under an incentive to settle. Before he reaches legal aid, the applicant risks liability for his opponent's costs in full. The opponent knows that costs protection is over the horizon, and will be reached more quickly if he acts to put the assisted person to extra expense.

20. A safety net system would involve conducting the legal aid merits test at a later stage in the case. It might be assumed that a more accurate assessment would be possible since more information about the case would be available.

Drawbacks

21. The main argument against a safety net is the uncertainty of its protection. The litigant commencing a case knows what his spending limit on his own costs will be, but he does not know whether he will subsequently be granted legal aid, and he faces an uncertain and possibly large liability in respect of his opponent's costs. It is possible that this could undermine the objective of overcoming the deterrent to litigation caused by fear of cost.

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22. Uncertainty about the outcome of a piece of litigation is inevitable. The prospects of success of a case can change as it proceeds, and a legal aid certificate can be discharged in such circumstances. It is primarily the function of lawyers, rather than the LAB, to give the best possible advice about prospects and to revise that advice as more evidence comes to light. A litigant should not be put in a position, in the general run of cases, where he has spent a substantial sum only to learn that he has no case. However, if a litigant is not prepared to risk his own money in pursuing his case, it is difficult to see that the taxpayer should do so.

23. As regards the potential liability for opponent's costs, this would be indirectly related to means since in the majority of cases opponents' costs are likely to be of the same order as own costs; (this assumption is discussed in Annex E). Given that the spending limit was based solely on one year's income, most unsuccessful litigants would face a similar bill as they might have been ordered to pay under section 17 of the Legal Aid Act 1988, under which it is generally deemed reasonable to order the assisted party to pay costs to the same amount as his annual income contribution. It seems unlikely that opponents would take advantage of the different safety net rules by seeking to inflate their own bill. If they did so, *inter partes* taxation exists to protect the unsuccessful litigant.

24. However, the situation would be complicated when the spending limit included a capital element. It would seem appropriate to introduce a fraction for capital of 50%, so that unsuccessful litigants would retain sufficient money to meet opponents' costs of a similar level to their own.

25. Nevertheless, this approach has the drawback that some litigants would face opponents with unusually high (but not unreasonable) costs or whose costs had accrued more rapidly in the early part of the case. Litigants would know that their

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potential liability was likely, but not certain, to be no greater than their spending limit. This would be part of the risk they assumed when choosing to litigate.

26. Other drawbacks of the safety net are as follows.

(a) Complexity. The logic of the system (for example the mid-way merits test and the split liability for opponents' costs) and the method for calculating the spending limit could confuse (and possibly deter) some litigants.

(b) Merits. There is a danger that those conducting the later merits test, rather than operating more stringently, would in practice tend to give the benefit of the doubt to the litigant who had committed a considerable sum of money towards a case

(c) Control. There would be no direct controls of pre-legal aid costs. These would involve the LAB administration in a much larger number of cases (see Chapter 9, paragraph 8). Rather the system relies on the merits test to weed out hopeless cases, and taxation/ assessment to limit unnecessary expense. There remains a danger that the fund could become involved in bogged-down cases or be committed to an unnecessarily expensive course of action.

(d) There could be an incentive for the client to run up costs extravagantly, in order to reach his fixed spending limit and the relative haven of legal aid as quickly as possible.

A safety net panel

27. Some of the difficulties with a safety net would be reduced if there was a panel of safety net solicitors who met accredited standards of quality and efficiency. As expensive cases would switch to legal aid, this could be linked with the further development by the LAB of franchising for legal aid lawyers. In many cases, the Board would become the guarantor of quality rather than a provider of financial assistance. Safety net panel members would be well placed to understand and explain the complexities of the system, and to assist clients in calculating their spending limit. They would also have shown themselves to be good predictors of prospects, a vital role under this approach. Finally, there would be less likelihood of wasteful expenditure or inefficiency during the first part of the case.

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Conclusion

28. It is necessary to consider the three options in the light of the general criteria described in paragraph 6 above. Each provides financial assistance in cases of need. Universal eligibility, furthermore, eliminates any danger that those whose costs will ultimately prove to be within their means will be deterred by fear of higher costs. On the other hand, many more litigants would benefit unnecessarily from the protection of legal aid. This would add to the administrative costs of the LAB and prove burdensome to unassisted opponents. A safety net avoids these problems, but introduces an element of greater uncertainty for prospective litigants. A flexible limit could involve the advantages and disadvantages of either of the other options depending on the operation of the costs assessment.

29. The options involve very different approaches to controlling the progress and cost of cases.

(a) The safety net places much of the onus on the litigant and the lawyer. As the knowledge of the litigant is likely to be limited, much depends on the quality of the legal advice he receives. The answer may be for the LAB to franchise safety net solicitors.

(b) The alternative is direct administrative control by the LAB. Such controls would be needed for free legal aid in any event. Under universal eligibility, however, the LAB could apply controls throughout the life of any case, although at substantial administrative cost.

30. Any of the options would involve some additional legal aid expenditure. This will depend on ensuring value for the money spent. The development of appropriate control systems, such as franchising or UCAPS, is therefore likely to be a precondition of wider eligibility. An emphasis on demonstrable value for money also argues for the more focused expenditure and lighter administrative burden of the safety net approach. This option is therefore considered in detail in Chapter 9.

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Chapter Nine

LEGAL AID SAFETY NET: DETAILS OF A SCHEME

Introduction

1. This chapter considers in more detail the possible structure of a safety net legal aid scheme. The litigant would begin a case in a private capacity up to an appropriate spending limit. If the limit was reached, the litigant would then, subject to a merits test, be eligible for assistance from the safety net scheme.

2. The potential litigant would select a solicitor who was willing to transfer to the safety net if that became necessary, possibly from a panel of franchised safety net solicitors. The solicitor would then help the client calculate his disposable means and spending limit. If an immediate application for legal aid was not suggested, the solicitor would ensure that the proofs of income etc. needed for any later application were available.

3. As with any other private case, client and solicitor would also decide on the arrangements for remuneration for the first part of the case. The costs of a case are unlikely to accrue at the same rate as regular instalments from income. It would be necessary to agree whether and how any payments on account would be made. The operation of the safety net, however, would depend on the incurred costs of the case; it would be irrelevant whether the client actually paid his contribution to his solicitor sooner or later. Indeed, although the spending limit would be calculated on the basis of annual income, the client could finance his case by any means he wished, eg. from income, credit or capital not forming part of the spending limit.

4. The rest of this chapter poses a number of questions about key elements in the structure of a system of this kind, and suggests possible solutions. Respondents to this paper are invited to comment on any of the issues raised, or on other

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points of detail concerning the workings of a safety net scheme.

Eligibility

5. **Who, in terms of means would be entitled to apply to the safety net scheme?** The concept of a safety net assumes litigants who are able to pay at least a proportion of their costs from their own resources. Therefore, it is clearly not applicable to those who would receive free legal aid, which would continue broadly as now. Paragraphs 10-14 below consider whether there is also a need to retain a contributory legal aid band for those who were unlikely to complete even the simplest case without needing further assistance.

6. At the other extreme, it may be thought appropriate to exclude the very rich in any event, although even they in theory could start a case which proved beyond their means.

Application process

7. **Should there be a facility to register cases with the safety net scheme at the outset, or should the first (and only) application occur when the litigant had already reached his spending limit?** An initial application could serve a number of functions.

(a) A provisional merits test could be made to advise the applicant of his chances of later receiving legal aid. However, since circumstances could change, this could not be a guarantee, and would therefore be of limited value. Worse, it could provide false security. Under a safety net scheme, the onus would be on the litigant's lawyers to provide sound advice as to prospects.

(b) A means test could be conducted, and the applicant told what his spending limit would be. This would not be necessary, if the calculation was simple enough to permit self-assessment (paragraph 16 below).

(c) Estimates could be made of the scheme's future liabilities, which would aid financial management.

(d) It would be possible for the Legal Aid Board to operate controls on costs throughout the life of a case.

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8. The major drawback of a preliminary application procedure is that the LAB would incur administrative expense in a much larger number of cases. Much of this effort would prove unnecessary since many cases would not in the event require further assistance. Annex J estimates that around 44000 cases which would not exceed their spending limit would be started privately per year.

9. Applications at the beginning of a case or at any time before the spending limit was reached should therefore be discouraged. Nevertheless, the option could be retained for those who had particular difficulty in calculating their own spending limit (eg. business cases). It would be appropriate to charge an administrative fee in such cases.

A contributory legal aid band?

10. **Should immediate legal aid be available when the spending limit is clearly inadequate?** There will be some applicants whose case seems likely or almost certain to exhaust their spending limit. There may be a case for allowing them immediate access to legal aid, without first spending their contribution. For the litigant who qualified for it, contributory legal aid would have two advantages. He would not be uncertain, during the early stages, whether his case would pass the merits test (although legal aid could still be withdrawn if the merits changed). Secondly, protection from opponents' costs (see Chapter 8, paragraph 13) would also be more certain, because any liability would be limited by the operation of the legal aid costs rules. However, immediate legal aid would make little difference in terms of liability to pay towards own costs, which would be calculated in roughly the same way under either system. Moreover, it is not clear that the safety net would prove an unreasonable deterrent to lower contributors in particular. The period between their starting a case and applying for legal aid would be relatively short, limiting the period of uncertainty and

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the unrestricted liability of unsuccessful litigants for their opponents' costs.

11. A further advantage of a contributory band springs from the fact that the minimum spending limit for safety net legal aid ought to be sufficient to allow some positive progress on the case, at least the taking of initial advice, before an application for legal aid was required. It would probably need to be at least £100. If the safety net operated immediately above the level for free legal aid, it would in effect be necessary to waive contributions below that amount.

12. The disadvantages of a contributory band are as follows.

(a) The higher the upper limit of a contributory legal aid band, the larger the number of cases where own costs were lower than the contribution. Any legal aid band should therefore only cover levels of contribution which would be exceeded by costs in the great majority of cases.

(b) Those in the contributory band would not be subject to "private client realism" to the extent that they would be under a safety net arrangement.

(c) The overall system would become more complex. The same approach to means assessment would be needed throughout, so that litigants were eligible for only one of free, contributory or safety net legal aid. However, once eligibility was established, it would be possible to calculate contributions on a different basis. This would be necessary if a capital fraction was used under the safety net (see Chapter 8, paragraph 24) since this would not be appropriate for contributory legal aid. The result would be that people of lower means could receive immediate legal aid, but some would pay a higher contribution.

13. The arguments for and against an intermediate contributory legal aid band appear finely balanced. The overall scheme would be more complex and some cases would receive legal aid unnecessarily, although the numbers would not be significant up to a contribution of around £300. On the other hand, although in reality their liability would be much the same, those who remained eligible for legal aid would not face the additional uncertainty which a safety net approach might engender. An option would therefore be to allow those whose safety net spending limit would be less than say £300 to apply for immediate contributory

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legal aid.

14. On the other hand, the safety net scheme represents a major departure from the existing system, which it may be appropriate to test first at a higher level. An alternative option, therefore, would be to keep the contributory legal aid band much as it is now with the safety net starting immediately above the current eligibility limits. This would achieve a major objective of the safety net, by extending assistance to those who are now ineligible but who face the possibility of high costs, but it would not affect those who now qualify for legal aid. However, the disadvantages described in paragraph 12 above would apply to a larger number of cases. This option would effectively constitute a straightforward extension of eligibility, and is unlikely to be possible until improved control of legal aid costs can be demonstrated.

Assessment of contribution

15. **What factors are relevant to determining the spending limit?** The spending limit in a safety net system would have broadly the same objectives as contributions under legal aid (see Chapter 7, paragraphs 4-9). Its particular importance is in giving the litigant a clear and direct financial interest in the conduct of the case. It could be calculated in the same way as existing contributions or incorporate any of the specific reforms described in Chapter 7, for example a sliding scale for the contributory fraction.

16. If, as was argued in paragraphs 7-9 above, litigants should not apply for legal aid before reaching their spending limit, it follows that they must be able to assess that spending limit for themselves to determine when they should apply. This presupposes a much simpler system than at present, using only readily identifiable factors and straightforward calculations. Chapter 7 (paragraph 30) argues that the precision of much of the existing assessment procedure is unnecessary. This would be even

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more true with a safety net system, because only marginal differences in the spending limit, rather than all or nothing eligibility, would be at stake. Simplification means assessment is discussed in detail in Annex K.

The contribution period

17. **Should contributions from income continue throughout the life of a case?** Chapter 7 (paragraphs 19-23) argued that legal aid contributions from income should continue to be collected throughout the life of a case, subject to annual uprating or reassessment. The same approach could apply to a safety net scheme. This might involve the litigant periodically adding to his spending limit to reflect further income. It follows that, once the limit was reached, contributions would continue under legal aid.

18. This approach would:

(a) reflect the greater ability to pay of many of those who might receive assistance from the safety net;

(b) reduce the number of cases needing assistance, because in some cases the costs would never catch the increasing spending limit; and

(c) generate more contribution income in cases which did require the safety net.

19. However, there are a number of drawbacks.

(a) The system would be more complicated. Litigants may not understand the need to chase a constantly retreating spending limit, and self-assessment of means would become more onerous.

(b) The safety net would involve a much greater degree of uncertainty for the litigant. This would be particularly significant in respect of opponents' costs. Some unsuccessful litigants could be liable for costs incurred over a substantial period.

(c) As a result, the incentive for the litigant to reach his spending limit as quickly as possible, in order to limit his liability for opponents' costs, would be increased.

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(d) On the other hand, a solicitor who was charging more than the going legal aid rates would have an incentive to delay, in order to keep the case private for longer.

(e) Depending on other aspects of the system, there could also be a significant additional administrative burden, in terms of reassessments, collection and enforcement of contributions.

20. Given these drawbacks, a better approach might be to base the safety net spending limit on income from a fixed period (probably one year), with continuing contributions once legal aid was reached. This would more closely reflect the ability to pay without increasing complexity and uncertainty for litigants. Once legal aid was reached, contributions would be backdated or delayed so that they related to successive annual income periods.

Operation of the trigger

21. **What happens when the spending limit is reached?** At some point during his case, a litigant may apply to fall into the safety net and obtain legal aid. There would need to be a merits test at this stage. Proof would be required that the applicant's means and spending limit were as stated. The solicitor would also submit a copy of his bill to date, to show that the necessary costs had been incurred. The legal aid certificate would date from the point at which the limit was reached.

22. A mechanism would be required to ensure that the expenditure which triggered the grant of legal aid was reasonably incurred. The taxpayer should not be liable for the costs of a larger part of the case, because some of the earlier expenditure had been extravagant or wasteful. This is a particular danger, given the possible incentive to reach legal aid as quickly as possible, in order to enjoy its more certain protection against opponents' costs. Furthermore, it is undesirable for opponents to face a legally aided party sooner than strictly necessary.

23. It follows that when determining the liability of the legal

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aid fund the pre-spending limit costs and the later costs should be seen in the same light. Expenditure on items not allowable on the standard basis of taxation should be discounted, as should any difference between the hourly charging rate agreed by solicitor and private client and the going rate. An artificially high charging rate would be the easiest way for a client, who was ready to pay up to his full spending limit, to reach legal aid quickly. This approach would mean that, subject to any solicitor-own client taxation, the litigant would be liable for any disallowed costs in addition to his spending limit.

24. It may be thought that this would involve the litigant in paying more than the amount it was deemed could reasonably afford, and that if he could afford to do so, the spending limit should have been higher. However, Chapter 7 (paragraph 14) argues that contributions do not represent a precise calculation of spending capacity. There will always be individuals able and willing to find more than the assessed amount. If such a person attached exceptional importance to his case, he could choose to pay for a particular lawyer or a "Rolls Royce" service.

25. There are two possible ways of allowing for the effect of unreasonable expenditure.

(a) The Board could conduct an interim assessment of the solicitor's bill, when considering the application. Legal aid would be refused where expenditure was judged to be unreasonable. A measure of flexibility would be necessary where the assessed spending was reasonably close to the actual limit, in order to avoid almost immediate reapplications. However, in any event, this approach would involve a substantial, additional administrative process.

(b) Alternatively, an adjustment could be made at the end of the case, when the litigant's bill was taxed or assessed. Subject to other recoveries, the legal aid fund would meet the bill as allowed on the standard basis, less the litigant's spending limit. This would leave the litigant liable for his original spending limit plus anything disallowed on that part of the bill dating from before the grant of legal aid. This approach would effectively protect the taxpayer, although the opponent would still face legal aid costs protection from an earlier date.

26. Option (b) is preferable. The interim bill submitted on

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application should not be considered in detail. Legal aid should only be refused if the bill was blatantly inflated. It is for consideration whether a revised date could be calculated after the taxation, from which costs protection should operate. Otherwise, opponents with heavy costs would stand to recover less under the legal aid costs rules than they would have done privately.

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PROVISIONAL CONCLUSIONS

1. In the last resort, people must be able to enforce their legal rights in the courts. Legal aid is an essential means of securing this in an adversarial system which depends for its operation on professional legal help. The high cost of that help is regarded as one of the main obstacles to access to justice. However, on examination, it is clear that although the cost of legal proceedings has risen steadily (and is often disproportionate to the amount at issue), the majority of cases are not inordinately costly in absolute terms. The real obstacle for many people is uncertainty about what the cost is likely to be. Lawyers argue that litigation is inherently uncertain, and this is true to a degree. But that uncertainty can be reduced by skilful handling of the case by a competent lawyer. The profession itself has recognised the unwillingness or inability of some lawyers to forecast likely outcomes or to explain how bills will be made up. The availability of legal aid has meant an increasing volume of work for lawyers and this may have disguised the need for improved performance, price competition and better marketing. There is now a responsibility on the profession to improve the service it provides and not simply to expect the taxpayer to make up the difference between what litigants can pay and what lawyers wish to charge.

2. The main options for change which are canvassed in this paper start from the premise that in order to target legal aid effectively it is necessary to look not only at the means of potential applicants but also at the alternative sources of funding available to them and the costs they face. Public funds should not cover cases which individuals can afford, but should provide assistance to those who are currently excluded under a fixed limit eligibility regime and so effectively debarred from pursuing expensive cases. In this sense the provisional conclusions of this stage of the review confirm and indeed extend

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the principle which has underpinned the development of the legal aid system.

3. However, in the face of burgeoning expenditure on legal aid it is clear that eligibility cannot be extended without better cost control and improvements in efficiency. If legal aid is to be targeted effectively it cannot be used to fund inefficient practices and procedures. Moreover, since legal aid has to compete for priority in expenditure plans with other spending programmes, it is essential to demonstrate that value is being obtained for public money spent.

4. The Government's programme of reform of court procedures and of the provision of legal services will help to remove some inefficiencies and rigidities. In relation to legal aid itself, proposals for a new control and payment system and the Legal Aid Board's franchising proposals will help to provide the necessary framework within which the profession can ensure that it is organised and equipped to provide the service which is required at an affordable price.

5. The financial eligibility conditions themselves, as a secondary purpose, should also support improvements in efficiency by encouraging direct consumer involvement in what is being done and what it is costing. However this is unlikely to be effective in the absence of reform of the supply side of the market.

The Options

6. The three major funding options which have been canvassed in this paper are legal expenses insurance, a contingency legal aid fund (CLAF) and a safety net scheme. Some possible reforms to the existing system have also been discussed.

7. What cannot be offered is a straightforward extension of the eligibility limits. This would not ensure that legal aid is directed to those who need help in the light of the costs they

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face. Nor does the review favour a flexible upper limit. Although this purports to target provision, it would be difficult in practice to do so accurately, thus including some who should be excluded and vice versa.

8. Each of the options canvassed by the review would, albeit in different ways, target help with legal costs to where it is needed. Legal expenses insurance is a private sector solution to the problem of extending eligibility which would place decisions on coverage on individuals. A CLAF while publicly administered would be funded by those who use it. A safety net scheme would be publicly funded and administered but only above the limit of what individuals could reasonably be expected to pay for their own cases. Each of the options recognises that there will be a very large band of potential litigants who cannot reasonably be expected to pay any "contribution" from their own resources whether by way of insurance premium, initial fee, spending limit or traditional legal aid contribution. Each therefore assumes the continuation of free legal aid to those qualified for it, subject to the statutory charge or possibly a percentage deduction under a CLAF.

9. The options which are proposed are not, of course, mutually exclusive. Legal expenses insurance exists now and up to a point could continue to attract purchasers alongside a CLAF, a safety net or a traditional legal aid scheme. A sufficiently flexible and well developed insurance market might allow the option of excluding from public funding those whose means would be sufficient to provide themselves with insurance cover. A safety net scheme (as discussed in Chapter 9) could either replace or supplement all or part of contributory legal aid. Much the same is true of a contingency legal aid fund, although given the drawbacks of this approach it may be preferable to treat it as a supplement to extend assistance to those outside the existing legal aid scheme. If this were done, it would not be possible to make the safety net available in the same classes of case, since given the choice a plaintiff with good prospects of success would

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be likely to avoid the CLAF and choose the safety net. As demonstrated in Annex H, a CLAF is most likely to be successful if its use is restricted to plaintiffs with personal injury cases.

10. The public sector options for funding are the safety net and a CLAF. On balance it is provisionally thought that the safety net proposal is the one which best targets legal aid to need. It incorporates a flexible upper limit while removing from legal aid those who do not need its assistance. However, views are sought on this, on possible improvements to either scheme, and on the extent to which - given that they would in practice both be administered by the Legal Aid Board - the two schemes can exist side by side. In considering the operation of the two schemes, the consultation paper recognises that there might be a case for introducing them, if they were thought acceptable in principle, at a higher level than strict logic suggests: initially, for example, at the present level of contributions above which applicants become ineligible for legal aid.

11. If the public sector options, separately or in combination, are not thought apt to solve the problem of those now ineligible, consultees are asked:-

(a) whether the private sector option of insurance would serve instead, either as it is currently provided or with modifications; and

(b) if not, whether they have any other proposals for tackling the problem, bearing in mind the limitations stated in paragraph 7 above.

12. Consultees are invited to comment on any part of this paper but it would be particularly helpful to have comments (and information) on the following.

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General

(a) In what ways do individual litigants who are ineligible for legal aid fund their cases? Do private litigants behave differently from legally aided litigants and does the handling and cost of cases differ? (Practitioners are invited to respond to the questions set out in Annex E).

(b) Are there, to the knowledge of consultees, significant numbers of potential litigants with good cases who are ineligible for legal aid and who do not proceed? On the basis of what information do they make that decision?

(c) To the extent that potential litigants are deterred by expense, is it uncertainty about cost or absolute levels of cost which is the major deterrent?

Contributory legal aid and the safety net

(d) Is it right to define eligibility in relation to both means and costs? Is the safety net approach the best means of achieving this? Should eligibility vary according to the type of case?

(e) How should the amount that people can reasonably pay towards their litigation be determined? Should this vary with the type of case? Why are offers of contributory legal aid refused?

(f) Should there be a sliding scale for assessing contributions and spending limits? Should contributions from income be payable for more than the current one year period?

(g) Are the proposals in the paper for a simplified form of means assessment acceptable?

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(h) Should a safety net scheme incorporate an initial application in order to conduct means and merits tests? What advantages would consultees see in such a process? Should there be an intermediate contributory legal aid band?

(i) Have you any comments on any other features of the scheme described in Chapter 9?

Legal expenses insurance

(j) Is the possibility of excluding from legal aid people for whom legal expenses insurance is readily available acceptable in principle? If not, why not?

(k) If acceptable in principle, what criteria would legal expenses insurance have to meet before such a policy was possible?

Contingency legal aid fund

(l) Is the principle of winners subsidising losers inherent in a CLAF acceptable?

(m) Which of the various methods of funding a CLAF are preferable? What factors determine the maximum level at which deductions and fees could reasonably be set?

(n) What relationship should a CLAF have to other schemes? Should a CLAF be restricted to particular types of case, such as personal injury cases.

(o) Have you any comments on the detailed workings of the scheme described in Chapter 6.

13. Views would also be welcome on any further options which can be identified but which have not been covered in this paper.

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ANNEX A

Civil Legal Aid
Background Information

Growth of civil legal aid 1950 - 1990

1. Table 1 shows the increase in the cost of civil legal aid and the number of people benefitting from it over the lifetime of the scheme. Table 2 analyses the recent position in more detail. It covers non-matrimonial civil legal aid only. It shows the annual figures for certificates issued and bills paid since 1985/86. It also shows the average cost of a legal aid case both in absolute terms and converted to 1989/90 prices.

Table 1

Period	Certificates issued p.a.		Average gross exp. p.a.	
	No.	% +/-	(£k)	% +
50-55	25989	-	1176	-
55-60	21513	(17)	1855	58
60-65	79607	270	4584	147
65-70	123792	56	8530	86
70-75	183087	48	16350	92
75-80	183077	0	37107	127
80-85	189720	4	90139	143
85-90	248270	31	198106	120

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Table 2

Year	Certificates No.	% +/-	Bills No.	Gross cost (£k)	Ave. cost per case (£)	% +	Ave. cost 89/90 prices (£)	% +
85/6	107950	-	66408	63062	950	-	1155	-
86/7	118780	10	69261	70923	1024	8	1213	5
87/8	119765	1	74706	83694	1120	9	1273	5
88/9	117895	(2)	81309	106920	1315	17	1417	11
89/90	131433	11	85517	130466	1526	16	1526	8
Increase 85/6 - 89/90:						61		32

NOTES

(a) Table 1 includes all civil cases, Table 2 non-matrimonial cases only.

(b) Table 2 shows the number and value of bills paid. These figures cover High Court, county court and "court undecided" cases only.

Eligibility

2. Table 3 includes broad estimates of the number of people eligible for civil legal aid in 1979, 1989 and 1990. Chapter 2 (paragraph 10) argues that such an approach to eligibility is of limited value. Table 4 compares the number of adults eligible for free and contributory legal aid with the number of non-matrimonial civil legal aid certificates issued, to show the proportion who commence a case. It suggests that people are far more likely to pursue litigation if they have to pay nothing towards it.

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Table 3

	Percentage eligible				
Year	Households	Population	Adults		
			All	Free	Cont.
1979	77.2	73.8	74.8	28.8	46.0
1989	67.6	63.6	63.3	24.2	39.1
1990	*61.5* PI: *65.5*	*66.1* *69.2*	*56.3* *60.3*	*22.0* *22.0*	*34.3* *38.3*

Table 4

Year	Number of certificates		Number of adults (000's)		Propensity to litigate (n in 1000)	
	Free	Cont.	Free	Cont.	Free	Cont.
1979	*49491*	*13796*	10937	17465	4.5	0.8
1989	104218	27215	9443	15220	11.0	1.8

NOTES

(a) Table 3 refers to eligibility on income grounds alone. The estimates of eligibility for 1979 and 1989 are based on the Family Expenditure Survey (see Annex B, paragraphs 3-5).

(b) The 1990 estimates are based on the Policy Simulation Model used by the DSS, which uprates figures from earlier FES years. Therefore, they are not directly comparable with the earlier figures. Estimated eligibility for personal injury and other cases are shown separately. The higher proportion of the population eligible reflects the separate assessment of children's means introduced in April 1990.

(c) Due to differences in the way that legal aid statistics were recorded, the figures in Table 4 for legal aid certificates issued in 1979 are based on estimates.

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Increases in general litigation.

3. Table 5 compares the increase in the number of legal aid certificates issued to the overall number of proceedings of equivalent types. It shows that the volume of litigation generally has increased at a faster rate than legal aid. It also estimates the proportion of individual litigants who were legally aided.

Table 5

Year	Legal Aid		All litigation		No. of Individuals	
	No.	% +/-	No.	% +	No.	% on LA
1985	94200	-	186716	-	209122	-
1986	102621	9	202359	8	234322	44
1987	101942	(1)	212843	5	241364	42
1988	101039	(1)	254285	20	276154	37
1989	111967	11	306479	21	332223	34
85-89	511769	19	1162682	64	1293185	40

NOTES

(a) The figures for legal aid certificates refer to financial years, while the figures for all cases are for calendar years.

(b) The figures for general litigation (excluding commercial debt collection) are based on actions commenced in the Chancery and Queen's Bench Divisions and the county courts for personal injury, landlord and tenant, contract, and other miscellaneous proceedings. To arrive at a comparable figure for legal aid, certain proceedings, such as adoption, have been excluded.

(c) The proportion of cases in which one or both parties was an individual litigant (as opposed to a corporation or institution) was estimated from a sample of cases in the Queen's Bench Division taken during the year in question.

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Payments made to solicitors.

4. Table 6 shows that while a substantial proportion of legal aid work is undertaken by a relatively small number of solicitors, there remains a significant amount distributed between a large number of firms each handling only a few cases.

Table 6

Range of total payment	Offices receiving payment No.	%	Total Payment Amount (£k)	%
£1-20000	6479	57	37788	9
£20-60000	2876	25	103034	24
£60-100000	974	8	75531	18
£100000+	1126	10	210834	49
Total	11455	100	427187	100

NOTES

(a) The table includes all payments made to solicitors in respect of civil legal aid certificates, criminal legal aid orders in Magistrates' courts, legal advice and assistance, assistance by way of representation and the duty solicitor schemes, except for payments on account and set-offs in settled cases.

(b) A firm may have more than one office to which payments are made

(c) The figures are for 1989/90

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Conduct of surveys of means and costs

1. This annex describes the research undertaken by the review team into the means of potential litigants, and the cost of legal aid cases.

Means

2. Information on the means of the population was drawn from two main sources. The first was the Family Expenditure Survey (FES), which shows the average expenditure and income for a representative sample of the population as a whole. The second was the survey of the means of individuals who actually applied for legal aid.

FES: Methodology

3. The FES consists of a representative sample of the population, broken down by income and type of household (ie. number of adults and children). It shows the average household expenditure on various items for each gross income band. It can be used to estimate the effect of changes in the legal aid limits on the number of people eligible for assistance and the cost of the scheme.

4. The 1989 FES Report was used to estimate eligibility as follows. The gross income bands in the FES were converted to bands of disposable income by deducting average expenditure on housing (including rates or community charge), income tax and national insurance, and allowances for partners and children. This process was repeated for each household type and range of gross income. The number of households falling below the 1989/90 income limits for free and contributory legal aid could then be estimated. A less reliable estimate of overall eligibility, incorporating a limited amount of information on capital, was also made. This was based on 1988 data. Tables 3 and 4 in Annex C show the proportion of eligible households, applied to bands

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of gross income uprated to 1990 prices.

5. The FES data has a number of limitations, which limit the accuracy of these calculations.

(a) It is inevitably somewhat out of date. The latest available published information refers to 1989, while the Central Statistical Office database, used to estimate capital holdings, currently covers 1988.

(b) Information on capital is limited. At best, a notional figure can be imputed from the average investment income for each gross income band. There is no information on non-income producing assets.

(c) The FES is concerned with the income of physical households, regardless of the number or status of the adults living there. In legal aid terms, a household consists of an individual, his or her partner and any dependants. This makes it difficult to disaggregate the effect of lodgers, adult children, flat sharers etc. The calculation of eligibility was restricted to those households that could be treated as legal aid units. This involved excluding approximately 15% of the sample.

(d) The methodology is based on a figure for average expenditure in each gross income band. The use of averages for arbitrary bands can give a misleading impression of the position of households at the extremes of a wide band. In order to calculate the allowance for different household types separately, it is necessary to use relatively large ranges of gross income. Alternatively, an overall average dependants' allowance can be applied to narrower income bands. In practice, both methods produce similar results.

(e) It is not possible to identify separately a number of the factors taken into account by a legal aid means assessment. The information on investment income is limited, and there is none on benefits in kind. On the other hand, several types of allowance have not been considered, including work-related expenses, non-child dependents and the discretionary factors.

Applicants' means: conduct of survey

6. Data was collected, relating to assessments carried out by the LAAO during June 1990 on applications for non-matrimonial civil legal aid. The following cases were excluded: appeal court cases, income support applications and reviews of previous applications.

7. The survey was based on the L14 form used by the LAAO to

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calculate disposable income and capital. The Legal Aid Board, (Accounts Department and Area Offices) provided supplementary data on each application. This included the type of proceeding, whether an offer had been accepted or rejected, and whether a certificate was issued.

8. The sample numbered 7935 cases. Analysis concentrated on the following areas:

(a) relationship of gross and disposable income,
(b) sources of income,
(c) income allowances,
(d) capital,
(e) contributions.

9. These were analysed by the following variables:

(a) Type of proceeding (in 8 categories recorded by the LAB): adoption, custodianship, wardship; landlord and tenant; contract; running down; accident at work; medical negligence; other negligence (including other personal injury and most professional negligence cases); other non-matrimonial cases (mainly property, trusts, wills).

(b) Type of household (7 categories): single adult; couple with no children; lone parent; couple with one child; couple with two children; couple with three or more children; child applicant.

10. The full list of data collected for each application is as follows.

Income

For both applicant and partner:

Gross wages or salary
Child benefit
State benefit
Interest
Benefits in kind
Income from self-employment
Other, eg. maintenance, student grant, rent

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Income Allowances

For both applicant and partner:

Income tax
Statutory disregards, eg. attendance and mobility allowances
Employment expenses
National Insurance
Dependent relative(s) living with applicant
Community Charge
Loans and hire purchase
Other discretionary allowances, eg. school fees
Discretionary disregards, eg. benefits paid to supplement a war pension

For applicant only:

Housing costs - householder (home owner or tenant)
Housing costs - non-householder (boarder or lodger)
Partner living with applicant
Dependent children living with applicant
Partner or former partner not living with applicant
Dependent children not living with applicant
Dependent relative(s) not living with applicant

Capital

For applicant and partner:

Liquid capital, ie. bank deposits etc.
Stocks and shares
Money due to applicant
Capital from business
Reversion or remainder
Items of value eg. jewellery
Other property, ie. second homes
Loan value of life assurance policies

Capital allowances

For applicant and partner:

Contingent liabilities under a covenant, court order etc.
Other debts
Discretionary disregards, eg. money set aside for a special purpose

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Supplementary information

Legal aid reference number
Child applicant? Yes/No
Case code (identifying type of proceeding, type of court, type of litigant)
Emergency certificate issued? Yes/No
Date of issue of emergency certificate
Date of issue of full certificate
Capital limit waived? Yes/No
Outcome of application, including certificate issued, refused on merits, refused on means, offer rejected, decision outstanding

Limitations of the data

11. The sample is somewhat smaller than a full set of assessments from one month. On occasions, the Area Office could not find the supplementary data relating to an L14, and in others a final decision on the outcome of an application had not been made.

12. The sample consists only of those who applied for civil non-matrimonial legal aid. This inevitably weights the sample towards lower income households, as those who believe they have a chance of qualifying are more likely to apply (see Tables 1 and 2 in Annex C). The means survey also produced a different picture of household distribution from that suggested by the FES. The Table below shows that a disproportionate number of single adults applied for legal aid.

TABLE: HOUSEHOLD TYPES

TYPE	MEANS SURVEY	FES
Single adult	49.4%	27.7%
Lone parent	6.1%	5.0%
Couple, no children	24.0%	27.0%
Couple & 1 child	8.1%	12.6%
Couple & 2 children	7.6%	18.2%
Couple & 3+ children	4.8%	9.5%

13. It was clear that some of the L14s included errors, for example pence shown as pounds, and inconsistencies, eg. between

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partners' allowances claimed (used to define household type) and the sources of income shown. Where possible, these errors were corrected, but inevitably a number remain.

Cost of closed legal aid cases

14. Data was collected on cases "closed" by the Legal Aid Board, that is all financial matters completed including the satisfaction of the statutory charge, during September and October 1990. It covered non-matrimonial civil cases in the High Court, county courts or "court undecided". The requisite information was drawn from the Legal Aid Board Accounts Department's computer.

15. The sample consisted of 17523 cases. The analysis concentrated on the following main areas:

(a) the pattern of gross costs of cases; the gross cost is the full, final legal aid bill for the case, before any recoveries or interim payments made are deducted. It does not include any pre-certificate costs.

(b) nature of expenditure: profit costs, counsel's fees, disbursements; and

(c) how the cost was met: costs orders, contributions, statutory charge, legal aid fund.

16. The effect on the above of the following variables was analysed:

(a) Type of proceeding in the 8 categories used by the LAB (see paragraph 9 above).

(b) Type of court: high; county; undecided. The last covers cases where the court was not known at the time when the legal aid certificate was issued, and where it was not subsequently evident from a judgment.

(c) Type of litigant: plaintiff, defendant, other party.

(d) Length of case: time from issue of certificate to the receipt of final taxed/ assessed bill by the LAB Accounts Department. In the absence of comprehensive information on the date of judgment or settlement, this period approximated to the length of the legal case proper. It excluded any time for enforcement of costs, contributions or statutory charge, before the legal aid case could be closed.

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(e) Result: won, lost, settled, otherwise disposed of. Won and lost covers cases where a judgment was given by the court, in favour of or against the assisted person. Settled includes all cases where an agreement was reached between the parties, whether before or during proceedings. "Otherwise disposed of" includes all cases where the certificate was discharged or revoked. This mainly consists of cases withdrawn or abandoned, often after an unfavourable opinion from counsel.

17. A full list of the information obtained on each case is as follows.

Legal aid reference number
Case code (identifying type of proceeding, court and litigant)
Result code (won, lost, settled or otherwise disposed of)

Maximum contribution (amount assessed by DSS)
Actual contribution (offer made to applicant)
Contribution received by LAB
Contribution repaid to litigant
Contribution retained by the fund
Contribution written off

Damages awarded
Damages received by LAB
Damages repaid to litigant
Damages retained by the fund
Damages not received by LAB

Costs awarded
Costs received
Costs written off

Pre-certificate costs awarded
Pre-certificate costs received

Solicitor's profit costs
Counsel's fees
Disbursements
Costs recovery costs

Date of offer of full certificate
Date of offer of emergency certificate
Date of final bill (ie end of case)

Problems with the data

18. The data was drawn directly from the LAB Accounts Department computer. Unlike the means survey data, it did not require manual inputting or merging with a second set of data. It should

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therefore be less prone to error. However, a few minor problems were encountered during the analysis. For example, it was not always possible to identify the size of the contribution requested from the litigant (as opposed to the maximum contribution assessed by the LAAO). In some cases where the figures for maximum and actual contribution differed, this was due to a retrospective adjustment of the latter when contributions were "written down", (ie. when an unpaid contribution was not needed to cover the final cost of the case because of other recoveries).

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Means: key findings

Spread of gross income

1. Tables 1 and 2 show the proportion of households falling in bands of gross income. Table 1 is based on FES 1989, uprated to July 1990 prices. Table 2 is drawn from the survey of applicants means. This illustrates the extent to which the profile of applicants in the survey is weighted towards the lower income families.

TABLE 1: FES 1989

Gross income (£)

<2570	2571-7100	7101-13000	13001-18500	18501-24500	24501+
3.1%	27.5%	19.8%	17.3%	13.1%	19.2%

TABLE 2: Means survey

Gross income (£)

<2645	2646-7000	7001-15000	15001-16000	16001-20500	20501-25000	25001+
16.1%	35.8%	26.4%	13.0%.	6.0%	1.7%	1.0%

Eligibility

2. Tables 3-5 show how eligibility for legal aid varies with gross income. For each income band, they show the percentage of households eligible for free and contributory legal aid and ineligible. Table 3 estimates eligibility on the basis of income alone, using FES 1989. It suggests that almost 68% of households (equivalent to 64% of individuals) were eligible. This compares with figures of 63% and 59% if FES 1988 is used; the difference may be due to the higher mortgage rate in 1989. Table 4 estimates

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eligibility including capital, based on FES 1988, as 51% of households or 50% of the population; (this is subject to the problems mentioned in Annex B, paragraphs 5a & b). Finally, Table 5 shows the position of applicants for legal aid in June 1990.

TABLE 3: FES 1989

Gross income (£)

	<2570	2571-7100	7101-13000	13001-18500	18501-24500	24501+	Total
Free	100	74.6	10.5	18.1	-	1.1	29.2
Contributory	-	24.4	80.9	42.0	41.9	10.3	38.5
Ineligible	-	-	8.6	39.9	58.1	88.6	32.3

TABLE 4: FES 1988

Gross income (£)

	<2800	2801-7800	7801-15500	15501-21800	21801-25000	25001+	Total
Free	97.1	60.6	5.4	-	4.2	0.9	24.9
Contributory	1.3	24.7	49.0	38.8	3.2	3.5	26.0
Ineligible	1.6	14.6	45.5	61.2	92.6	95.6	49.1

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TABLE 5: Means survey

Gross income (£)

	<2645	2646-7000	7001-11500	11501-16000	16001-20500	20501-25000	25001+	Total
Free	91.1	65.6	36.2	26.7	13.5	14.2	6.5	54.7
Contributory	3.3	33.8	60.1	53.8	40.1	25.1	13.0	36.3
Ineligible	5.5	0.6	3.7	19.5	46.4	60.6	80.5	9.0

3. These tables demonstrate that under the present system gross income alone is not necessarily a good indicator of eligibility. The allowance system produces a wide range of gross income (about £11000 to £25000), in which all three outcomes (free, contributory or ineligible) occur to a significant degree. There is also a small number of higher income households which are eligible. These points are illustrated in the graphs overleaf, which show the pattern of eligibility found in the means survey.

Determinants of eligibility

4. The means survey was used to analyse the significance of the various sources of income and capital and the allowances against each, recorded by the LAAO. Figures were obtained for 7935 cases, including 6868 instances where income sources/allowances were shown, and 2087 with capital. Table 6 at the end of this annex indicates the frequency, average value and overall significance of each item. Part A of the table analyses (i) the various sources of income and (ii) income allowances, by bands of gross income. It shows (a) the frequency with which an item occurs, (b) the average value of these occurrences, and (c) the proportion of the gross income of all cases in the band which the item represents. Part B analyses capital by bands of gross capital.

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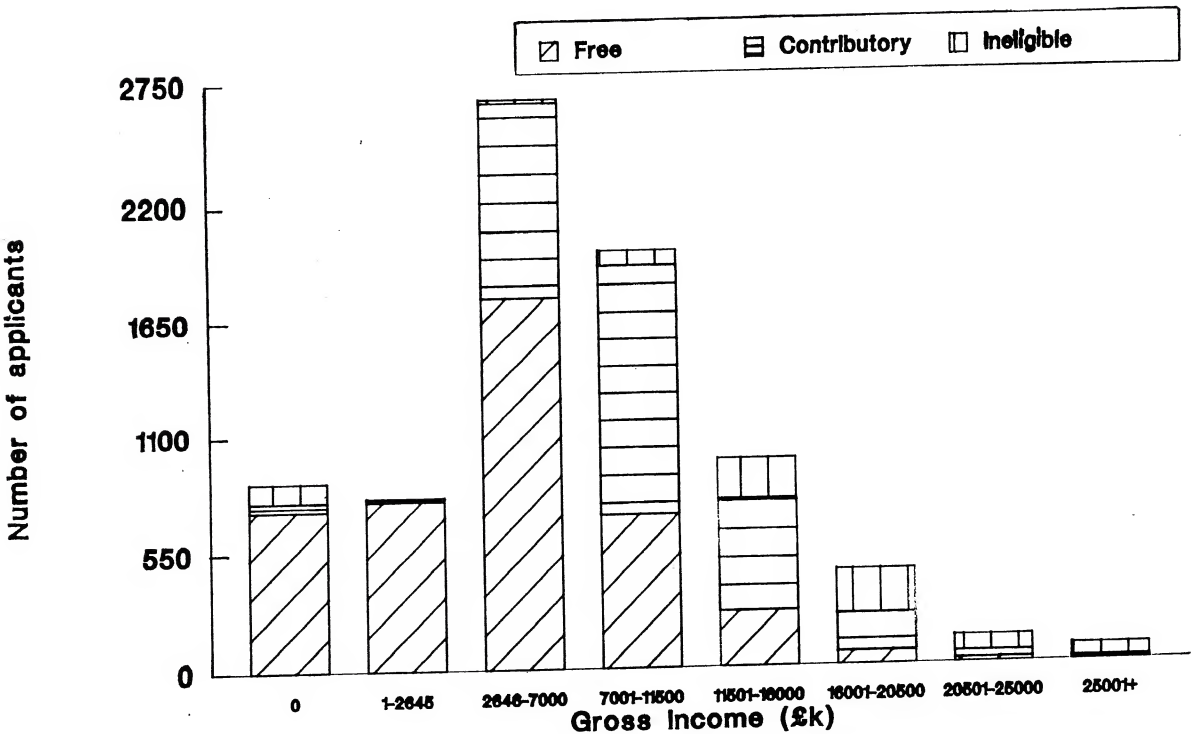
Means Survey
Eligibility of Applicants



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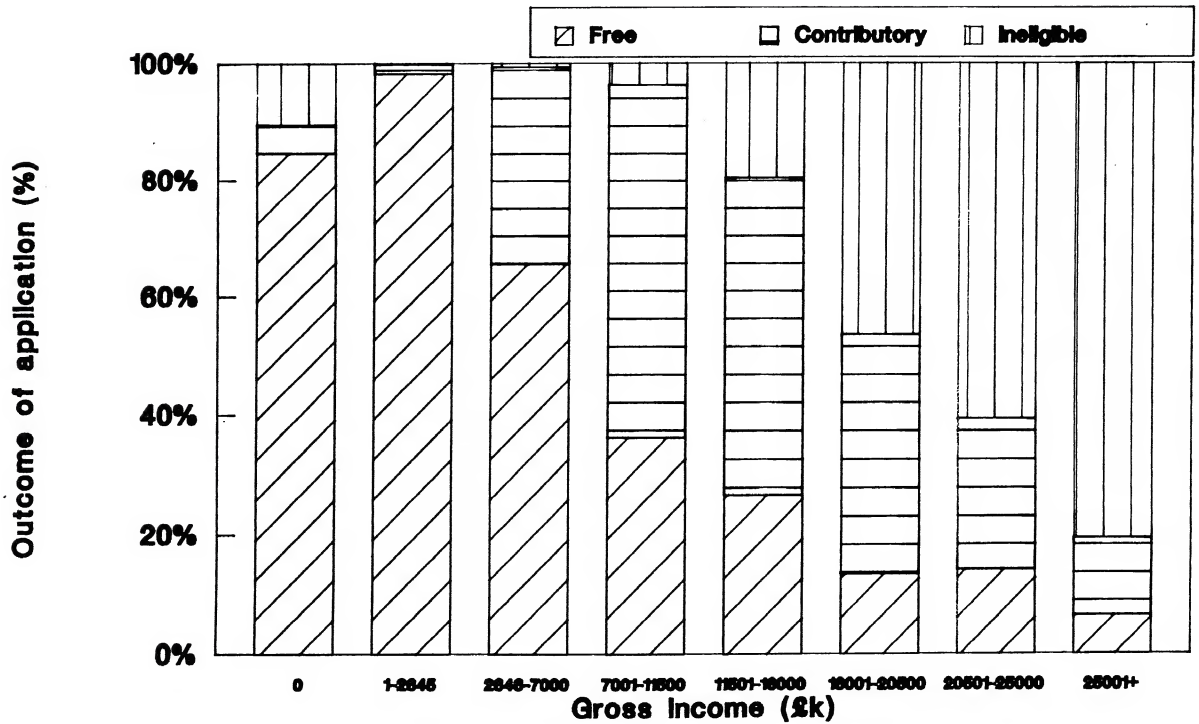
Means Survey
Eligibility of Applicants



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Income

5. The analysis shows that overall 67% of income takes the form of wages and salaries, with a further 11% income from self-employment. State benefits are also significant (13%), although primarily at the lower end of the income scale. Partners' income (of all types) accounts for 26% of the total. On average, total allowances amount to 64% of gross income. This is made up of 20% taxes and national insurance, 22% housing, 15% dependants' allowances and 8% other. Given that tax is broadly related to income, the two key variable factors which affect eligibility and the size of any contribution are clearly the dependants' and housing allowances.

Capital

6. There were 2235 applicants (28%) in the means survey with capital resources. However, only 366 (5%) had disposable capital in excess of the free limit of £3000, and 223 (3%) were eligible for contributory legal aid. Capital represented 19% of the total contributions assessed. The major form of capital was bank and other deposits, representing 58% of total capital assessed. Capital allowances were only made infrequently: 5.5% of cases, representing 9.9% of gross capital assessed.

7. The means survey also suggested that the Legal Aid Board rarely exercised its discretion to waive the upper capital limit in cases where the costs were likely to be high. Only four examples (2.7%) were found in 147 cases above the upper limit. In three of these cases, the offer of a contributory certificate was rejected.

Contributions

8. The means survey was used to analyse the pattern of refusals of offers of contributory legal aid. An offer was refused in 20% of contributory cases where the outcome was known at the time of

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the survey. The pattern does not vary significantly by household or proceeding type. The proportion of rejections increased with the size of the contribution, (see Table 7 below). Offers involving a capital contribution were more likely to be rejected (44.1%).

TABLE 7

Contribution	Rejections
Up to £50	4.2%
£51 to £250	12.5%
£251 to £500	18.1%
£501 to £750	25.2%
£751 to £926	31.6%
Over £926	50.0%

Expenditure on "leisure" items

9. For purely illustrative purposes, the FES 1989 was used to calculate average household expenditure on a selection of inessential or leisure items. This was then compared with the average legal aid contribution for each gross income band. This could be said to indicate the degree to which spending plans might have to be changed, in order to afford a legal aid case.

10. The types of expenditure chosen were alcohol, cigarettes, meals in restaurants and holidays, as these could be identified most readily. However, there are many other expenditure items listed in the FES which could be classed, at least in part, as inessential, for example motoring, where expenditure might vary with the number and value of vehicles and the journeys made. The particular items chosen tend to underestimate leisure expenditure in the higher income bands. Table 8 below compares average expenditure in 1989 on the selected leisure items at various levels of gross income with the corresponding legal aid income contribution (calculated using a 25% fraction throughout). It seems clear that if all inessential expenditure could be calculated, it would on average substantially exceed a legal aid contribution.

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TABLE 8

Gross income (£)	Contribution (£)	Leisure Exp. (£)
5850	17	568
7800	284	756
10400	552	1171
13000	914	1218
15600	618	1552
18200	906	1725
20800	1587	1844
23400	1620	2611
26650	2319	2355
30550	2816	2744
35750	3514	2853
42250	3495	4247

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TABLE 6

Gross Income (£)

Part A (i)	< 2,645	2646-7000	7001-11500	11501-16000	16000+	All cases
Cases in band %	617 (9.0)	2667 (38.8)	1969 (28.7)	967 (14.1)	648 (9.4)	6868 (100)
Wages a:	17.5	43.9	82.6	93.3	93.1	64.2
b:	1,244	3,568	7,796	11,927	18,068	8,764
c:	12.9	33.3	71.0	82.6	83.4	67.2
Child Benefit	3.1	6.5	7.4	5.3	2.5	5.9
	510	467	489	347	284	455
	0.9	0.6	0.4	0.1	0	0
Other state Benefit	35.8	60.7	27.5	17.8	13.1	38.4
	1,811	2,990	2,765	2,194	2,696	2,784
	38.5	38.6	8.4	2.9	1.8	12.8
Interest	23.7	29.6	27.0	30.8	32.1	28.7
	120	212.3	201	100	98	173
	1.7	1.3	0.6	0.2	0.2	0.6
Other Income	20.1	32.8	21.6	16.8	19.4	24.9
	1,053	1,576	2,163	1,819	2,526	1,777
	12.6	11.0	5.2	2.3	2.4	5.3
Benefits in Kind	46.5	28.2	27.0	10.1	5.9	24.8
	996	1,023	1,050	908	965	1,019
	27.5	6.1	3.1	0.7	0.3	3.0
Self-Employment Income	7.0	11.2	14.8	16.5	17.6	13.2
	1,436	3,808	6.917	9,094	13,667	6,865
	5.9	9.1	11.3	11.2	11.9	10.8
Partner's Income	3.2	23.7	35.3	61.3	82.6	36.0
	1,385	2,706	4,825	7,163	10,381	6,017
	2.7	13.6	18.8	32.6	42.5	25.9

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Part A (ii)	<2,645	2646-7000	7001-11500	11501-16000	16000+	All cases
All Allowances a:	21.6	99	99.8	100.0	100.	92.5
b:	1,222	2,495	6,047	9,786	13,337	5,872
c:	15.6	52.5	66.6	72.7	66.2	63.9
Income Tax	0.8	28.9	86.4	97.4	98.6	59.1
	716	436	1,376	1,852	3,233	1,600
	0.3	2.7	13.1	13.4	15.8	11.3
Employment Expenses	2.9	22.6	65.5	81.5	84.6	47.3
	315	442	633	893	1,295	771
	0.6	2.1	4.6	5.4	5.4	4.4
National Insurance	3.2	34.5	86.1	96.1	97.1	61.1
	170	244	515	837	1,212	630
	0.3	1.8	4.9	6.0	5.8	4.6
Housing Costs (Rent or Mortgage)	7.3	37.3	52.9	72.4	84.4	48.5
	868	1,255	2,682	3,532	4,857	2,767
	3.8	10.0	15.6	19.0	20.3	16.0
Housing Costs (Board and Lodgings)	8.3	47.2	43.1	26.4	15.4	36.6
	802	1,175	1,619	2,087	2,490	1,462
	3.9	11.8	7.7	4.1	1.9	6.4
Partner Allowance	3.2	37.0	50.6	73.2	86.9	47.7
	1,749	1,799	1,787	1,778	1,775	1,787
	3.4	14.2	10.0	9.7	7.7	10.2
Resident Child	1.9	18.6	34.2	48.9	50.0	28.8
	812	1,025	1,046	991	1,070	1,031
	0.9	4.1	3.9	3.6	2.7	3.5

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Part A (ii)	<2,645	2646-7000	7001-11500	11501-16000	16000+	All cases
	1.8	17.7	33.6	50.2	58.2	29.2
Dependants b:	656	500	1,5	1,9		
c:	0.7	1.2	1.5	3.6	1.5	1.4
Community Charge	9.6	49.7	65.6	71.8	69.8	55.6
	281	364	508	601	675	491
	1.6	3.8	3.7	3.2	2.3	3.3
Loans & HP	0.3	3.1	10.1	20.4	25.5	9.4
	339	969	1,028	1,107	1,306	1,115
	0.1	0.6	1.1	1.7	1.7	1.3
Miscellaneous Allowances	1.3	10.6	20.6	29.3	31.5	17.2
	370	513	667	2,879	1,309	230
	0.3	1.2	1.5	6.3	2.0	2.6

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Gross Capital (£)

Part B	<3000	3001-9000	Over 9000	All cases
Cases in band %	1681 (80.5)	289 (13.8)	117 (5.6)	2087 (100)
Deposits a: b: c:	78.9 697 61.7	91.7 4,092 71.1	80.3 14,752 48.9	80.7 2,015 57.9
Shares	16.8 531 10.0	34.9 2,105 13.9	25.6 6,147 6.5	19.8 1,322 9.3
Insurance	26.2 851 25.1	16.6 2,411 7.6	10.3 4,368 1.8	24.0 1,085 9.3
Other Capital	3.9 732 3.2	11.8 3,306 7.4	35.0 29,680 42.8	6.7 9,834 23.5
Capital Allowances	2.3 2,522 6.4	20.8 4,245 16.7	13.7 14,521 8.2	5.5 5,113 9.9

KEY

a = % of cases in band where item occurs

b = Average value of occurances

c = % item represents of total gross income or capital

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Cost of legal aid cases: key results

Spread of costs

1. The main purpose of the survey was to identify patterns of cost and the factors affecting them. The figures below refer to the gross cost, ie the total lawyers' bill for a legally aided case, in 15640 cases. They exclude 1883 cases in the sample where no claim was made against the fund, (probably abandoned soon after the issue of the certificate). Table 1 below shows the number and percentage of cases falling in bands of gross cost, and the proportion of the total gross cost that the cases in each band represent. The cost was less than £2500 in 86.2% of cases, with nearly 30% under £500. Four cases exceeded £50000, the most expensive being £105,110. The average cost of a case was £1521.

TABLE 1: Spread of costs

Gross cost (£)

<500	500-1000	1001-1500	1501-2000	2001-2500	2501-5000	5001-10000	10001-25000	25001-50000	50k+
4454	4290	2539	1395	809	1461	494	167	27	4
28.5	27.4	16.2	8.9	5.2	9.3	3.2	1.1	0.2	0
5.3	13.3	13.1	10.2	7.6	21.0	14.3	10.2	3.7	1.3

Factors affecting gross cost

i. Type of court

2. Unsurprisingly, High Court cases tended to be more expensive than county court cases, with court undecided cases falling between the two. The average cost was £2620.94 for the High Court and £1108.97 for county court cases. 92% of county court cases and 70% of High Court cost less than £2500.

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ii. Type of litigant

3. It made little difference to the cost of cases whether the legally aided party was the plaintiff or the defendant. The average gross cost was £1536 and £1462 respectively. The proportions over £2500 were 13.6% and 14.5% respectively.

iii. Type of proceeding

4. Gross costs also followed a broadly similar pattern regardless of the nature of the proceedings. Table 2 shows the average cost, and the proportions below £1000 and £2500 for each category.

TABLE 2

	Cost £	<£1000 %	<£2500 %
Adoption etc.	1825	50.5	80.2
Contract	1322	59.5	88.7
Landlord/tenant	976	67.4	92.6
Running down	1944	42.8	80.7
Accident at work	1924	45.5	79.7
Medical Negligence	2439	51.3	80.8
Negligence other	1225	61.1	91.3
Other non-mat.	1315	63.1	88.5
All cases	1521	55.9	86.2

iv. Result

5. Of the cases with a gross cost, 22% were won, 7% lost, 50% settled and 21% otherwise disposed of. Losing cases (average £2304) appear to be more expensive than winning (£1795) or settled cases (£1628).

v. Length

6. The average case length was 2 years and 43 days. 29% of cases took less than a year, and 77% were completed within 3 years. Table 3 shows the distribution of case lengths, the average gross cost by length and the average cost per month. It suggests that cost increases fairly steadily with length.

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Table 3

Length	Cases No.	%	Ave. cost £	Cost per month £
< 6 months	1484	9.5	499	161
6 mos-1 yr	3049	19.5	765	87
1-2 years	4757	30.4	1146	67
2-3 years	2714	17.4	1616	55
3-4 years	1661	10.6	2191	53
4-5 years	899	5.7	2944	55
5-6 years	517	3.3	3384	52
6 years +	559	3.6	5099	57

vi. Means of litigant

7. The cost of cases was analysed by the size of the assisted person's contribution, to see whether this would provide some confirmation of the contention that better off people tend to have more expensive cases (see Annex E, paragraph 5). The average cost of free cases was £1474 compared with £1682 for contributory cases. However, Table 4 illustrates that there was no consistent pattern within the contributory range.

Table 4

Maximum Contribution (£)

	Free	<50	51-100	101-250	251-500	501-750	750-926	926+
No.	12071	35	329	922	1095	571	151	148
Cost	1474	1785	1711	1580	1720	1681	1358	2056

Factors affecting net cost

8. The various sources of payment to the legal aid fund to meet the cost of cases were analysed. Overall, 51% of the gross cost of the cases in the sample was met by costs orders, 2% from

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contributions retained, 4% from the statutory charge and 44% from the fund itself. This compares with figures of 42%, 4%, 4% and 50% respectively shown in the LAB's accounts for 1989/90.

9. Of the 15640 cases with a gross cost, 9002 (57.5%) involved a net cost to the fund. In 7773 of these cases (49.7% of the whole) the fund met 100% of the gross cost. Therefore, it can generally be said that either the opponent or the legal aid fund will cover the full cost of a case. The decisive factor is whether the case is successful and a costs order made.

10. Different types of proceeding vary in terms of both success rate and whether a costs order is likely to be made in a successful case. As a result, the pattern of net cost is markedly different to that for gross cost. Table 5 shows the number of cases in each category of proceeding, the proportion of total gross and net costs they represent, the average percentage of the cost met by the legal aid fund and the average net cost.

TABLE 5

	Cases No.	Cases %	Gross Cost %	Net Cost %	Fund Cost %	Ave.Net Cost £
Adoption etc.	1893	12	15	33	98	1785
Contract	1815	12	10	14	59	801
Landlord/tenant	1286	8	5	8	66	629
Running down	2175	14	18	3	7	148
Accident at work	1679	11	14	5	16	298
Medical neg.	555	4	6	5	37	1010
Negligence other	3687	24	19	15	34	397
Other non-mat.	2550	16	14	18	55	713
All cases	15640	100	100	100	44	659

Cost recovery

11. The survey emphasised the frequency with which costs are not awarded in favour of apparently successful assisted litigants. Costs were awarded in 6426 of 11280 won or settled cases (57%); this figure is 64% if the family cases in the sample are excluded. Costs are more common in settled cases (72%) than cases

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where a court found in favour of the assisted party (22%), (although it appears that some cases recorded as 'won' may be procedural applications where cost orders are not generally made). Table 6 shows the number and percentage of cases in various categories which won or were settled, and the number and proportion of these successful cases where costs were received.

TABLE 6

	Won/set.	% of tot.	Costs	%
Adoption etc.	1221	54	8	1
Contract	1079	51	336	31
Landlord/tenant	806	53	231	29
Running down	1948	84	1790	92
Accident at work	1363	79	1235	91
Medical neg.	248	42	124	50
Negligence other	2853	61	1898	67
Other non-mat.	1762	60	484	28
High Court	1657	58	415	25
County courts	5756	66	2134	37
Court undecided	3867	65	3559	92
Plaintiff	9442	69	6175	65
Defendant	1832	49	251	14
Damages awarded	6526	100	5918	91
No damages	4784	44	189	4
Cost <£500	2387	54	690	29
£501-1000	3287	77	1820	55
£1001-2500	3876	82	2401	62
£2501-5000	1190	81	806	68
£5000+	540	78	391	72

Contributions

12. A contribution was assessed in 3885 of the 17523 cases in the sample (22%). Payments were received in 3284 cases (85%), but these represented only 51% of the total maximum contributions assessed. The shortfall consists of reduced actual contributions and money written down or written off. Where a payment was made, some or all of the money was ultimately repaid to the litigant in 59% of cases (1951); this money represented 30% of the assessed total or 59% of receipts. Some contribution was retained

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by the fund in 1502 cases (46%), being 21% of the total amount assessed and 41% of receipts.

13. In a significant minority of cases, the maximum contribution exceeded the eventual gross cost. It was estimated that this applied to about 18% of the 3569 contributory cases in which there was a gross cost.

14. The information gained in the closed case survey was also used to estimate the likely effect of a number of possible changes to the contributory system discussed in Chapter 7.

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Costs of unassisted parties

1. This annex considers the available information on the costs of private litigation, for comparison with the costs of legal aid cases described in Annex D.

2. The cost of a legal aid case is the result of an assessment or taxation of the bill on the standard basis. This will usually allow solicitors' costs on the basis of a local "going" hourly rate. The unassisted person, on the other hand, could be required to pay his own solicitor's bill (or have it taxed on the indemnity basis) at whatever hourly rate was charged, and his opponent's taxed costs. Therefore, two main questions arise when considering the difference between legal aid costs and the cost potentially faced by a private litigant. What is the scale of any difference between legal aid and private 'own client' costs in a similar case, and what is the relationship between the costs of a plaintiff and defendant in the same case?

Existing information

3. A number of earlier studies have examined costs issues, for example the Royal Commission on Civil Liability and Compensation for Personal Injury and the Civil Justice Review. However, none included statistics which addressed the questions posed above.

4. One possibility considered was to compare the costs of legal aid and private bills by examining the recorded statistics on taxations or conducting a more detailed survey of actual bills held by the courts. However, a sample of taxed bills would not be fully representative of private costs, as there is no *inter partes* taxation in the majority of private cases, where the costs are agreed. Furthermore, bills could only provide information on the costs of one party, and would not strictly be relevant to solicitor-own client costs.

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5. Private and legal aid bills are both taxed on the standard basis, so it can be assumed that the same going rate would be allowed in both cases. Therefore, any difference found between them would not be a function of charging rates, but would reflect a variety of other complex factors. For example, wealthier litigants might on average have more complex and expensive cases; (this was suggested by the LAAC in its 1983/84 review (paragraph 341) as an argument against abolishing the upper eligibility limit). Alternatively, parties could behave differently when legal aid was involved, for example being less willing to accept an offer of settlement. It would therefore not be easily possible to tell from the figures whether any differences were caused by the inherent nature of the case or by the method of funding.

6. Given the problems described above, it was not considered worthwhile to conduct a survey of bills lodged in court. However, a limited amount of information is more readily available. In 1989, for example, in both county courts and District Registries (Queen's Bench Division), the average amount allowed on taxation was about 20% higher for private than for legal aid bills, (though the mix of cases in each group is not identical). The equivalent figure for the High Court in London cannot be calculated, because Supreme Court Taxing Office statistics do not distinguish legal aid and private bills. Another approach is to assume that the bill as claimed represents the full own client bill. On average, allowed bills came in at between 76% (Queen's Bench Division actions or matters in the Supreme Court Taxing Office) and 93% (county court, legal aid cases) of the amount claimed.

7. Solicitors, costs draftsmen and insurers involved in significant quantities of litigation were considered as a further possible source of information on private costs. However, it was found that few recorded the necessary information in a form from which a statistically valid sample could readily be drawn. It was therefore decided to limit further investigation of these

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questions to the impressions of a small number of experienced practitioners.

Survey of practitioners' views

8. The survey approached 23 solicitors' firms, selected with the help of the Law Society. Firms from all parts of the country were chosen, on the basis of their experience of both legal aid and private litigation. Each firm was sent a brief questionnaire, designed to elicit comments about the costs faced by legally aided and private litigants, and plaintiffs and defendants, and the reasons for any differences between them. Nineteen responses were received.

9. The questions and a summary of the responses are set out below.

Q.1 Do the cases of legally aided and private litigants, in similar types of proceeding, tend to exhibit different patterns in terms of complexity or value of claim?

Generally it was felt that there was no difference in complexity or value. One respondent commented that legally aided cases were often in respect of larger claims, because some clients who qualified for legal aid were those who remained unable to work following a serious injury.

Q.2 Are legal aid cases handled differently from private client cases? Do legal aid cases show a propensity to settle earlier or more often?

It was not thought that legally aided cases were handled differently from private cases. However, sometimes lower grade fee earners undertook the work, because of lower hourly rates.

It was also commented that private clients were more involved with their case and more likely to question the cost. A private client would often authorise expenditure up to a certain stage of the proceedings, and then consider whether it was financially viable to proceed.

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Most respondents felt that Legal Aid cases did not settle earlier or more often than private client cases. However, some respondents said that insurers are quicker to settle with legally aided plaintiffs, because they were unlikely to be awarded costs even if successful. One solicitor commented that legally aided litigants were more likely to refuse a reasonable offer of settlement, preferring to fight "on principle" knowing that there was no risk of costs.

Several respondents referred to the delay in payment for legal aid cases, and the additional delay and cost which resulted from the administrative procedures of legal aid, for example, the requirement to obtain authority before incurring a disbursement.

Q.3 Considering a typical or standard personal injury case (say injury at work or road accident), by what proportion would you expect the total bill faced by an individual private client to exceed the amount that would be allowed under legal aid? Does this reflect different hourly rates or items of work disallowed?

This question referred to the difference between the amount a solicitor would be allowed on a legal aid taxation on the one hand, and the solicitor-own client bill which a private client would be charged for a similar case on the other.

Five respondents said that there would be no difference in a successful case, because they would not normally charge a private client any costs in excess of those agreed with the defendant's insurers. Nine respondents felt that the private client would face a higher bill, because the going rate allowed by their local courts for legal aid cases did not match their own "expense of time" charging rate. Most estimated the difference at around 20% or 25%, with one quoting a figure as high as 50%.

It was commented that much depended on whether the local courts took a realistic view when setting the going rate and that the situation therefore varied between different parts of the country.

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Q.4 By what proportion would you expect the amount allowable on legal aid to differ from the amount allowed on inter partes taxation in a private case?

This question referred to legal aid and inter partes bills, both taxed on the standard basis.

About a third of respondents commented that the same amount should be allowed in both cases, since the basis for taxation was the same. A similar number added that a legal aid bill would be slightly higher, because the cost of the necessary contact with the Legal Aid Board would not be allowed inter partes. However, a third group felt that courts would allow higher charging rates in private cases; figures between 15% and 30% were quoted. The practice of courts in this respect appears to vary.

Q.5 What tends to be the ratio between the plaintiff's costs (whether legally aided or not) and those of the defendant in the same case? Do different ratios apply to different types of proceeding?

Almost half the respondents thought that the costs of plaintiffs tended to be higher than those of defendants; figures up to 50% higher were suggested. This was largely attributed to the extra work involved in establishing liability, obtaining expert opinions, calculating special damages and generally preparing the case for trial. Two respondents said there would be no difference where there was no issue on liability. The remainder were unable to assist as they rarely or never acted for the defendant.

Q.6 In a typical personal injury case, what is the approximate level of costs incurred by an individual private client in reaching each of the following stages: issue of writ/summons; setting down; case prepared for trial; judgment after full hearing? You may wish to estimate the absolute cost for each stage or the proportion of the total bill in a case which goes the full distance.

A number of respondents said they could not answer this question, because it was not possible to define a typical case. Others said a standard cost could not be ascribed to particular stages, because some proceedings were issued immediately and others only

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after lengthy negotiation.

Six respondents felt able to suggest some figures. Estimates for each of the various stages differed considerably, so it is not possible to draw detailed conclusions. However, overall most thought that about 50% of costs were incurred up to the setting down stage.

It was also commented that plaintiffs and defendants faced different patterns of costs. With the former, a significant proportion of costs were incurred prior to the issue of proceedings.

Conclusion

10. It has not proved possible to draw many firm conclusions about the questions raised in paragraph 2 above. However, the available evidence tends to support the assumptions that private clients could face bills about 20-25% higher than those paid in legal aid cases, that plaintiffs' costs in a case are the same or somewhat higher than defendants' costs, and that a larger proportion of the former will be incurred at earlier stages of the case.

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ANNEX F

Administrative costs

1. This annex considers the administrative cost of handling legal aid cases. It illustrates the comparative cost of free and contributory cases, and can be used to estimate the cost of administration under the options of a contingency legal aid fund (CLAF) and safety net legal aid (see Chapters 6 and 9).

2. To make these broad comparisons, a considerably simplified model of the processes involved in a civil legal aid case was used. The model excludes emergency certificates, discharges and revocations, the statutory charge and other miscellaneous matters. It therefore underestimates the average administrative cost of a certificate.

3. Estimates for the cost of each process included in the model were provided by the LAB and LAAO. The LAB figures are based on observations of the time spent on each task by clerical and executive staff, uprated by 150% to allow for the cost of overheads, including managerial and other senior staff[6].

4. The LAAO figures identify the unit cost (including overheads) of each type of assessment. Business and other non-income support cases have been combined. The cost of withdrawn applications, reassessments and investigating allegations has been incorporated proportionately. The figures refer to 1989/90, and therefore do not reflect the subsequent simplification of the assessment process.

5. The table below shows the average cost of each process and the frequency with which it occurs. Where possible, volumes refer to non-matrimonial cases (53% of all civil cases) in 1989/90.

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[6] This treatment of the LAB's legal staff tends to underestimate the cost of processes which have a heavy legal involvement, such as the merits test, and hence overstates the cost of those which do not.

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TABLE

Process	Ave. cost (£)	Vol.	Total (£)
1 Applications received	2.25	238790[1]	537278
2 Merits test	2.75	238790	656673
3 Means assessment			
a. IS cases	5.50	33430[2]	183865
b. Non-IS cases	14.00	205360	2875040
(c. Free applicants	11.00	147088	1617968)
(d. All applicants	12.81	238790	3058905)
4 Grant			
a. Free (79%)	2.50	107560[1]	268900
b. Contributory (21%)	4.00	28590[1]	114360
c. Certificate refused	1.50	62520[1]	93780
d. Offer refused	3.50	7150[3]	25025
5 Misc. correspondence (3 items per application)	6.00	238790	1432740
6 Handling contributions	4.25	24300[4]	103275
7 Assessment/taxation	5.75	96980[5]	557635
8 Receipt of costs/damages	8.00	40730[6]	325840
9 Refund of contribution	2.25	14340[7]	32265
10 Cost recovery	12.00	35000[8]	420000
11 Cost write-offs	3.50	6000[9]	21000
12 Chasing contributions (per letter)	0.25	90100[10]	22525
13 Contribution recovery (Legal costs)	-	-	150000[11]
14 Contribution write-offs	3.50	2460[9]	8610
		Total	7828811

1 = Annual Report 1989/90, Appendix 2(b)(i)(c).
2 = 14% of 1; LAAO estimate.
3 = 25% of 4b; means survey.
4 = 85% of 4b; closed case survey.
5 = Annual Report 1989/90, Appendix 2M.
6 = 42% of 7; closed case survey.
7 = 59% of 6; closed case survey.
8 = LAB Accounts Department estimate.
9 = Annual Report 1989/90, Appendix 2O; 53% for contribution W/Offs.
10 = LAB estimate, 1988/89 figures.
11 =Annual Report 1989/90, Appendix 4A (Note 3) x 53%.

6. The total cost of the processes covered in the model

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produces an average cost per application of about £33 or a cost per certificate issued of £57.50 (including an element in respect of rejected applications). The average cost of a particular type of case can be estimated by selecting the costs of relevant processes, and when appropriate adjusting in proportion to the volumes.

7. The average cost of a free certificate is about £34, estimated by taking the full unit costs of the application and grant stages (1,2,3c,4a,5 in the table above) plus the proportional cost of the assessment and costs recovery stages (7,8,10,11). The average cost of a contributory certificate can be calculated in a similar way, but including stages 6,9,12-14. It comes to almost £50 per case, or an additional cost of £16 per contributory certificate.

8. The processes involved with a CLAF or safety net legal aid would be rather different from those under the existing system. Nevertheless, rough estimates can be made for illustrative purposes. Under CLAF, there would be no means test and effectively no contributions (although there would be an initial fee in some cases). The administrative cost might therefore be similar to that for free legal aid less the means test, or around £23 per case.

9. Safety net legal aid would differ in a number of ways from existing contributory legal aid. The means assessment should be simpler in most cases, although continuing contributions would involve additional correspondence and more frequent reassessments. On the other hand, the later merits test might involve more work. Overall, the administrative cost might be similar to that for an existing contributory certificate or £50 per case falling into the safety net[7].

[7] An initial application, means and merits test in every case might cost about £19 (stages 1,2,3b) for cases not using the safety net, plus an additional £5 (1,2) for cases which did.

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Legal expenses insurance

1. This annex describes in general terms the main features of the family legal expenses insurance (LEI) currently available in the UK. However, the market is changing rapidly and the policies and approaches of individual insurers vary somewhat in detail.

Background

2. LEI can be purchased, for an annual premium, by individuals or groups. It provides funding if the individual or his family subsequently become involved in legal proceedings of a type covered by the policy. However, most insurers will usually only support cases which have a reasonable prospect of success and there is usually a maximum level of indemnity. Subject to the limit, most policies also cover opponents' costs if the insured is ordered to pay these.

3. LEI is still a relatively new product in the UK. It first appeared here in 1974, although the personal/family market has grown up only over the last decade. The first "add-ons" to other insurance were sold in 1979 and the first telephone legal advice line appeared in 1980. In 1982, the industry attempted to promote LEI in conjunction with the Law Society, but this proved unsuccessful. The market remained small for most of the 1980s, although growth has been more rapid in recent years.

4. The Association of British Insurers has estimated that total premiums are now worth about £40-50m pa., which represents a 100% increase in the last two to three years. This is divided between 50% motor related LEI, 20% general family policies and 30% commercial. About 10 million people have some form of cover, although in many cases this is restricted to access to a telephone advice line. The Consumers' Association and Law Society survey suggested that about 7% of the population had some form of LEI proper; this compares with an earlier, and possibly out

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of date, industry estimate of 2%.

5. LEI is subject to the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990/1159), implementing EC Directive 87/34, which came into force on 1 July 1990. The Regulations provide for the separate management of LEI from other insurance business in order to prevent conflicts of interest. They also require a free choice of lawyer to conduct any legal proceedings and a right to arbitration in the event of a dispute with the insurer.

Types of policy

6. There are two main types of LEI, "add-on" and "stand alone".

(a) Add-on policies are purchased as supplements to existing motor or home contents insurance and are usually limited in scope.

i. Motor policies cover uninsured loss recovery and injuries received in motor accidents. The typical premium is £5-£10.

ii. All home contents policies cover consumer disputes about goods and services and personal injury. Many also include other categories, such as employment matters. Most cost an additional £7.50 to £15.

(b) Stand alone policies are more expensive but offer much wider cover. They currently cost an individual or family between £85 and £150 pa., but can be bought more cheaply on a group basis, for example by an employer for his employees.

Limitations

7. Most policies exclude matrimonial disputes. Many also exclude building disputes, defamation, tax matters and defence of criminal prosecutions involving violence. Home contents add-ons often exclude motoring-related matters.

8. Policies are subject to a maximum indemnity limit, which covers both own and opponents' legal costs in the relevant classes of case. This is usually £25000 or £50000. Some include an excess of between £10 and £50.

9. There is usually a minimum value of claim, although these

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tend to be very low (mostly between £50 and £125). All are below the current small claims limit (£500)[8].

10. Disputes arising before the policy was taken out are not covered. Some policies exclude certain categories of claim in the first few months after a policy is taken out. Many include a time limit within which claims must be reported.

11. Insurers operate a type of merits test before accepting a claim for a civil case. This is usually expressed in terms of "reasonable prospects of success". Most insurers also retain the right to withdraw cover if a reasonable settlement is unlikely to be obtained or if the insured does not accept a reasonable offer.

12. If proceedings are taken, the EC Directive now requires insurers to allow their insured a free choice of solicitor. Most companies reserve the right to reject the client's nomination. One nominates a solicitor itself, although the insured person can object to this choice. The extent to which insurers can reject nominations or direct choice under the Directive has yet to be tested in the courts.

13. Some companies argue that it is essential to use only tried and tested firms of solicitors if LEI is to remain profitable. The firms are known to be competent, while insurers are able to negotiate favourable charging rates by concentrating their business.

The major companies

14. LEI can be purchased from a rapidly increasing number of insurance companies, other financial institutions and brokers. The Consumers' Association/ Law Society report identified 28 companies offering add-ons to home contents insurance, and 27 to

[8] Changing to £1000 on July 1 1991

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motor policies; the latter are also sold by many brokers. However, few of these institutions write their own policies, most acting as the intermediaries of a few specialist LEI firms. The recent growth in the market is largely the result of selling LEI in the name, and to the customers, of established financial institutions.

15. The LEI specialists write and manage policies, but do not usually underwrite them themselves. The underwriter is usually either the larger insurance company of which the LEI firm is a subsidiary, the intermediary company in whose name the policy is sold, or Lloyds syndicates. The underwriters often delegate the authority to pay a claim. They may themselves reinsure against large cases.

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Contingency legal aid fund
Estimated fees and deduction rate

1. This annex estimates the percentage deduction from damages likely to be needed to sustain a self-financing contingency legal aid fund (CLAF).

2. The calculations are based on figures from the survey of closed legal aid cases, and therefore assume that users of a contingency scheme will litigate a similar pattern of cases, in terms of type of proceeding, costs and damages awards.

Proposed scheme

3. This estimate applies to a CLAF with the following features. It would support meritorious cases in any class of non-family civil case currently covered by legal aid, regardless of the means of the applicant. Plaintiffs with money claims would agree to pay a pre-set percentage of any damages they were awarded; they would also pay an initial fee (say £100) to be offset against any subsequent surcharge. Plaintiffs who were not claiming damages and defendants would pay a larger fixed fee at the outset. The fund would pay any costs awarded against unsuccessful assisted parties.

Methodology

4. The total gross cost of the cases in the sample was calculated, distinguishing type of proceeding, plaintiffs and defendants, damage winners, other winners and losers. The total net cost of the cases in each category was then estimated. The closed case survey was used to determine the proportion of the gross costs of winners covered by costs awarded and recovered. In the case of losers, the gross cost was doubled to represent the fund's liability for opponents' costs.

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5. A fixed fee of about £850 would have been required to cover the net costs of defendants and non-money winning plaintiffs. This was considered unreasonably high (see Chapter 6, paragraph 30). A lower figure of £300 was therefore assumed; this would encompass just over half of existing legal aid contributors. The income generated by the £300 fee was then calculated. The outstanding cost of these cases was added to the net costs of money winners, to give the total which would have to be recovered from damages. This was compared with total damages awarded to determine the estimated percentage deduction.

6. The Table at the end of this annex shows the percentage deduction from damages required to sustain a self-funding scheme, given a fixed fee of £300 for those not claiming money and a down payment from money claimants of £100. It also shows the lower deductions which would be needed to sustain a fund which covered plaintiffs or damage-claiming plaintiffs only, and the fixed fees which would be needed to cover the costs of defendants, non-money claimants or all cases in full. The Table shows the equivalent figures for individual types of proceeding, as an indication of the cross-subsidies involved.

Assumptions

7. The following assumptions were made in the calculation.

(a) The pattern of cases litigated under a CLAF would reflect that in the survey of closed legal aid cases[9].

(b) All plaintiffs who won or settled, but were not awarded damages, are assumed to have paid the higher fixed fee, as are an equivalent proportion of losing plaintiffs. Overall, this may slightly overestimate fee income.

(c) Losers are assumed to face opponents' costs equal to their own gross costs.

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[9] This would not hold true, in so far as eligibility for legal aid varied according to the type of CLAF funding available (see Chapter 6, paragraph 29). In that case, the CLAF could expect a higher proportion of (more favourable) damage cases, so the percentage deduction would be lower than shown.

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(d) The pattern of cost recovery in different types of proceedings is based on an estimate. No allowance is made for different recovery patterns by type of litigant. Therefore, the cross-subsidisation of other litigants by damage winners may be greater than suggested in the table.

(e) The table is based on damages awarded, not damages received, which cannot be deduced from the closed case survey.

(f) The calculations do not incorporate a minimum level of claim. A fixed fee would produce more income from low award winners. (This would apply to awards below £1200, given a fee of £300 and a deduction of 25%).

Sensitivity of assumptions

8. It is necessary to test the robustness of the results in the face of less favourable assumptions. In particular, it must be assumed that some "adverse selection" will operate, reducing the number of successful cases.

(a) The first analysis assumes that various proportions of the successful cases will not apply to the scheme. The effect of ignoring the damage and fee income from these cases (which are assumed to have no net cost) was tested.

(b) A further calculation considers the possibility that some currently successful cases would lose without the benefit of legal aid cost protection. Damage income is lost, and the proportion of costs recovered reduced.

(c) Litigants with larger claims might be deterred from using the CLAF. Therefore, the effect of lower average levels of damages was tested.

(d) Finally, the effect on the percentage deduction from damages of setting the fixed fee at £100 and £500 is shown.

Conclusion

9. A comprehensive, self-financing CLAF scheme would need to retain about 25-30% of damages awarded to assisted litigants, and charge a non-returnable fee of £300 when damages were not in issue. Such a scheme would involve a considerable degree of cross-subsidisation, not only of losers by winners, but also of other litigants by plaintiffs claiming damages, and between different categories of case.

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10. The figure remains reasonably stable, when it is assumed that some currently successful litigants (say up to 25%) would prefer to risk litigating privately, or that the average level of damages claimed would fall.

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Table

	Contract	L & T	Acc. work	Running dn	Med. Neg.	Other neg.	Other	Total
Fees and deductions								
% deduction (All cases)	65.44%	122.29%	10.26%	4.05%	24.99%	26.99%	36.37%	20.87%
% deduction (damage cases)	28.16%	34.45%	9.85%	3.80%	16.33%	21.24%	18.31%	14.91%
% deduction (all plaintiffs)	37.70%	50.65%	10.24%	3.79%	24.99%	25.14%	29.26%	17.42%
Fixed fee: defendants	1315.51	1061.28	623.40	906.19	n/a	1042.18	1288.52	1048.02
FF: non-damage plaintiffs	1063.91	786.79	553.69	267.73	1592.25	572.47	921.25	693.85
FF: all non-damage cases	1236.55	989.56	556.90	540.68	1592.25	642.26	1027.68	842.54
FF: all plaintiffs	1246.36	866.38	624.34	350.90	2058.35	652.55	1087.07	851.95
FF: all cases	1277.22	977.32	624.34	371.07	2058.35	672.52	1123.85	884.50
Sensitivity tests								
10% fewer winners apply	74.04%	140.12%	11.46%	4.53%	27.99%	30.54%	41.24%	23.55%
25% fewer winners apply	91.24%	175.79%	13.85%	5.50%	34.00%	37.66%	50.97%	28.92%
50% fewer winners apply	142.83%	282.79%	21.01%	8.41%	52.00%	59.00%	80.18%	45.03%
10% winners lose	93.29%	182.63%	17.60%	9.11%	31.90%	39.70%	51.33%	30.51%
Ave. damages -10%	72.71%	135.87%	11.40%	4.50%	27.77%	29.98%	40.41%	23.19%
Ave. damages -20%	81.80%	152.86%	12.83%	5.06%	31.24%	33.73%	45.46%	26.08%
Ave. damages -30%	93.49%	174.69%	14.66%	5.79%	35.71%	38.55%	51.95%	29.81%
Fixed fee £500	57.48%	96.81%	9.94%	3.85%	23.65%	23.63%	31.41%	18.67%
Fixed fee £100	73.40%	147.76%	10.58%	4.25%	26.33%	30.34%	41.33%	23.06%

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ANNEX J

Safety net scheme: costing

1. This annex estimates the additional cost of a safety net scheme which included litigants who would currently be ineligible for legal aid. Given the same assumptions about volume and the same method for assessing contributions, similar figures would apply to the universal eligibility and flexible upper limit approaches discussed in Chapter 8.

2. The costing is based on information from the FES 1989 and the survey of closed legal aid cases, (see Annexes B and D). Use was also made of the DSS's Policy Simulation Model for 1990 and Inland Revenue statistics on capital holdings. However, an attempt to cost an entirely new system necessarily involves a number of speculative assumptions. The figures should be treated solely as indicating approximate orders of magnitude.

Assumptions

3. The key assumption in the costing is that potential users of the safety net would litigate with the same frequency as people currently eligible for civil legal aid. It is also assumed that the pattern of case costs would be the same as under legal aid.

4. The costing is based on a scheme with the following features.

(a) All non-family matters which currently fall within the scope of civil legal aid would be covered.

(b) Applicants whose spending limit was less than £300 would be eligible for immediate contributory legal aid. However, contributions and spending limits would be calculated in the same way, and are treated as synonymous below.

(c) The spending limit would be based on gross capital and disposable income. Allowances against gross income would be made

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for tax, housing and dependants only[10].

(d) Litigants, who exhausted their spending limit and moved into legal aid, would also be liable for further contributions from income for each year that a case continued. The closed case survey showed that the average length of a case was about two years. Therefore, the overall effect of continuing contributions has been incorporated in the costing, by doubling the income contribution in every case.

(e) The income related part of the spending limit would be determined by a progressive sliding scale shown in Table 1. The effect of this scale is shown in Table 2, which gives examples of the spending limit/ contribution due at various levels of disposable income, both under the existing system and the sliding scale. Those currently eligible with contributions up to £500 would pay the same as they do now.

Table 1

Bands of disposable income above the lower limit (£)	Proposed spending limit fraction
1 - 2000	25%
2001 - 4000	40%
4001 - 6000	60%
6001 - 8000	80%
> 8000	100%

[10] Those with income of over £39000 were excluded for the purposes of the costing because suitable data on them was lacking. It remains for consideration whether there should be a cut off point, and if so, where it should fall.

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Table 2

Disposable Income (£)	Contribution Existing System (£)	Sliding Scale (£)	Contribution as a % of disposable income Existing system	Sliding scale
2845	50	50	2	2
4645	500	500	11	11
6000	839	1000	14	17
8000	(1339)	2100	17	26
10000	(1839)	3500	18	35
12000	(2339)	5500	19	46
20000	(4339)	13000	22	65

NOTES:

(a) These figures are based on the 1990 lower income limit of £2645.

(b) At present, applicants with disposable income over £6350 are ineligible. Their notional contributions are shown in brackets.

(c) Contributions under the sliding scale have been rounded to the nearest stepped figure (see paragraph 6 below).

Method

5. The costing calculates the final cost of all cases starting under a safety net scheme in a given year (including those eligible for immediate contributory legal aid), although this cost would be incurred as cases ended over a number of future years. It is necessary to assume that once the system was established, the annual cost would (at constant prices) be roughly equivalent to this total cost. The costing is based on 1989/90 volumes and is in 1990 prices.

6. The first stage of the costing estimated the number of cases which would be commenced by individual litigants who might require assistance from the safety net. The proportion of adults

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falling in various income bands and household types was found from the 1989 FES Report. The average annual income contribution for adults in each category was calculated by deducting from gross income average expenditure for tax, rent and mortgage, and spouse and child allowances, and then applying the percentages shown in Table 1. A capital contribution was added in a proportion of cases, using information on capital holdings from both the Policy Simulation Model and Inland Revenue statistics. The results were rounded to produce a series of 69 stepped contributions or spending limits, starting at £50[11], and increasing, initially at £50 intervals, to £50000. The number of adults with each possible spending limit was grossed up to reflect the population as a whole.

7. The proportion of adults who would begin litigation in the course of a year was then estimated, using the ratio between the estimated number of people eligible for contributory legal aid (on both income and capital grounds) in 1990, and the number of contributory certificates issued in 1989/90. This ratio (2.5 in 1000) was applied to the total number of adults with each possible spending limit. In all, approximately 65000 litigants would be expected to start cases (see Table 3 below, columns A and B).

Cost of cases

8. The number of cases where the gross cost would exceed the spending limit (Table 3, column C), and the average gross cost of those cases, was then estimated using the distribution of costs from the closed case survey.

9. The average cost to the legal aid fund of the cases which fell into the safety net was found by subtracting the value of

[11] Those whose assessed contribution was between £25 and £74 would pay £50, those assessed at £75-£124 would pay £100 etc. Those currently paying contributions below £25 would receive free legal aid.

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the spending limit (or contribution) itself, and by estimating the average proportion of the remaining costs recovered from the opponent.

10. The closed case survey shows that costs are awarded in 42% of cases, and that on average over 90% of the gross cost of those cases is recovered. However, it was estimated that in about 45% of cases, the opponent would be another individual and therefore a potential safety net user. Such an opponent would be protected to a limited degree against costs. To reflect this, in 45% of recovery cases the amount of costs recovery was limited to the level of the average spending limit. Table 3 (column D) shows the average net cost of cases calculated in this way.

11. The total net cost of the safety net system was found by multiplying column D (net cost) by column C (volume) and reducing the final figure by 4% to take account of the effect of the statutory charge.

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Table 3

A Range of spending limits	B Total number of litigants	C No. of cases causing net cost to fund	D Average net cost (£)	E Total net cost (£) (C x D)
50 - 300	3683	3043	870	2646424
350 - 500	1587	1072	865	927739
600 - 1000	11816	5394	969	5229233
1100 - 2500	10057	2319	1309	3036499
3000 - 5000	15051	1144	2058	2353863
5500 - 10000	12860	302	3466	1047278
11000+	9815	63	5535	354737
Total	64869	13337	1169	15595773

Notes:

(a) The columns of the table contain the following information:

A. Ranges of spending limit.
B. Total number of litigants assessed at a spending limit within the relevant range.
C. Number of litigants whose cases result in a net cost to the legal aid fund.
D. Average net cost to the fund.
E. Total net cost to the fund (C x D); figures may not tally due to rounding in column D.

(b) The calculation was made for each of 69 possible spending limits. The income portion of the spending limit was doubled to reflect continuing contributions; as a result, there appears to be a very small number of litigants in the lowest bands. For presentational purposes, the table summarises the figures by ranges of spending limit.

Conclusions

12. Under the current scheme, there are about 25,500 non-family legal aid cases per year with contributions of £25 or more. These cases have a gross cost of approximately £42m and a net cost of

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£13.5m. By comparison, it is estimated that 65,000 people would litigate with the potential protection of the safety net scheme, (including many who already litigate privately). The gross cost of these cases would be some £109m. However, there would be a net cost to the legal aid fund in only about 13,500 of them. The estimated total net cost of a safety net scheme is £15.5m. The estimated net cost of non-family civil legal aid cases with contributions over £25 commenced in 1989/90 is £13.5m. **This additional net programme cost of the safety net, based on the assumptions described, is therefore about £2m.**

Analysis of cost by type of proceeding

13. The additional net cost was analysed in terms of types of proceeding, in order to estimate the cost of implementing the new scheme for certain categories of case only. The results are shown in Table 4 below. Two factors affect the net cost of the different proceeding types. First, some categories, for example medical negligence, have a higher proportion of more expensive cases, and therefore produce a larger number of additional cases falling into the safety net. Second, the off-setting factor of assessing larger contributions under the proposed scheme has a relatively greater effect in those cases, such as contract or landlord and tenant, where a lower proportion of the costs are currently recovered from opponents.

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Table 4

Type of proceeding	Safety Net £k	%	Existing system £k	%	+/- £k
Contract	2196	14	2220	16	(24)
L & T	494	3	735	5	(241)
Running down	2502	16	2344	17	158
Acc. at work	2416	15	2494	18	(78)
Medical Neg.	2622	17	1131	8	1491
Neg. other	1962	13	2099	15	(137)
Other	3403	22	2603	19	800
Total	15596	100	13628	100	1968

Note:

The proportions of net cost by proceeding type under the existing system shown here differ from those in Annex D (Table 3) because they refer to contributory cases and cover non-family proceedings only.

Administrative cost

14. Annex F estimates the unit cost of processing either a contributory legal aid case or a safety net case as £50. There are currently 25,500 contributory legal aid cases compared to an estimated 21,300[12] cases likely to fall into the safety net or receive immediate contributory legal aid. This suggests a possible administrative saving of about £200,000.

15. If an initial application stage was included, there could be an additional cost of £19 in up to 43,700 cases not requiring the safety net, plus a second application stage costing £5 in 14,500 cases falling into the net but not qualifying for immediate legal aid (assuming a cut off at £300). This represents an additional cost of about £900,000.

[12] This differs from the figure suggested by Table 3 above, because the effect of continuing contributions has been discounted.

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Means assessment

1. Chapter 7 (paragraphs 29-34) considered the issue of means assessment in general terms. It concluded that there was considerable scope for simplifying the existing procedures, because the arbitrary elements in determining the level of eligibility and contributions meant that complexity and detail could achieve only a spurious accuracy.

2. This annex considers the possible simplification of the existing system in the particular context of a safety net legal aid scheme. Under such a scheme, it would be highly desirable to avoid the need for an initial assessment for every potential user of the safety net. The aim should be for prospective litigants to be able to assess their own spending limit with tolerable accuracy.

3. Under the proposed approach, litigants would determine the value of their capital resources and their annual disposable income net of certain expenses and allowances. The necessary information should be readily accessible and the subsequent calculations straightforward. The Legal Aid Board (LAB) would publish tables showing the appropriate spending limits for various bands of capital and disposable income; these would incorporate the effects of a sliding scale for the contributory fraction. As now, the solicitor would normally assist the litigant with his application.

4. On commencing to act, the solicitor would record the date and the litigant's spending limit. This would provide a record of the capital held at that time, although it would remain difficult to detect deliberate deprivation before the litigation had begun. The solicitor would also ensure that the proofs of income and allowances (eg. statement of earnings from an employer), which would be necessary in the event of a later

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application to the safety net, were available.

5. The rest of this annex considers:

(a) the period on which litigants would base their calculation of income. This could be prospective, as at present, or retrospective;

(b) how litigants would determine their resources, how their statements would be verified, and whether there is a need to simplify the system by allowing litigants to disregard certain types of income or capital; and

(c) which current allowances currently should be (i) disregarded, (ii) standardised or (iii) retained as specific allowances which individuals would need to calculate for themselves.

Computation Period

6. The Legal Aid Assessment Office is currently required to assess the income which an applicant can expect to receive in the twelve months following the date of application and the capital he possesses at that date. However, in practice, much of the assessment is based on the applicant's statement of his current weekly or monthly income and expenditure, adjusted for any anticipated changes in future circumstances, eg. birth of a child. The Civil Legal Aid (Assessment of Resources) Regulations 1989 recognise the difficulty of projecting future income by allowing the assessment to be based on the income for the previous year in the absence of better information.

7. Any further significant change of circumstances during the computation period requires a reassessment to be conducted. A change of circumstance after the end of the computation period can lead to a new assessment and the discharge of the certificate.

8. It is likely to be easier for litigants to calculate their spending limit using actual figures. A retrospective computation period should therefore be adopted. It is proposed that litigants should calculate their income for the year ending on or about the

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date when their case commences. This should then be deemed to reflect their ability to pay a contribution (or spending limit) during the subsequent first year of the case.

9. A retrospective computation period would increase the likelihood of circumstances changing while the contribution was being paid. There are two possible ways of dealing with this. The first would be to eliminate reassessments altogether. In other words, the contribution would be in respect of past income from the period actually assessed. However, most litigants would not anticipate a legal action a year in advance and therefore might no longer be able to pay, having committed their income in some other way.

10. The alternative is to take account of significant changes of circumstance during the lifetime of the case. A capital windfall over a given limit could readily be added to the spending limit as the case progressed. However, income reassessment could be more complex if litigants had to recalculate their spending limit frequently in respect of different annual computation periods. Further work will be done to consider the degree of change which needs to be taken into account (eg. loss of job), and the mechanism for doing so.

Continuing contributions

11. Chapter 9 argues (paragraphs 19-20) that it would be unreasonable to require litigants to make a further computation each year and add the result to their spending limit. However, contributions should continue under legal aid, once a spending limit calculated on the basis of a year's income had been reached. To reduce administration, the LAB would usually order a contribution based on the original income spending limit uprated for inflation; the litigant would be required to declare any changes of circumstance above certain limits. The order would be back-dated or post-dated, so that legal aid contributions became due from the first anniversary of the case beginning, thus corresponding to a further notional annual assessment period.

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Sources of means and allowances

12. This section examines the various sources of income and capital and the allowances against each, currently recorded by the LAAO. For each, it considers whether items make a significant difference to the outcome of assessments, and the ease of self-assessment and subsequent verification. Items of low value or which arose only rarely would be disregarded. Substantial but predictable factors could be standardised, as part of the contribution calculation.

Verification

13. All means tests rely to a large degree on full and honest declaration by applicants. The temptation to conceal may be greater with a self-assessed system. Proof could be required in every case for income from employment or relevant state benefits and for any allowances claimed. However, there would inevitably be scope to conceal capital or types of income which do not appear in every case (eg. interest, rent from lodgers). There are two possible approaches. All cases could be subject to a detailed official means assessment at the time of application for legal aid; if necessary, the spending limit could be adjusted or legal aid refused. Alternatively, it may be sufficient to rely on a well-publicised procedure for investigating a random sample of applicants in detail, possibly leading to prosecution for fraud. On balance, it may be more appropriate that a substantial benefit which affects third parties should not be granted without an external check on means in each case.

Sources of income

14. The current procedure looks at all an applicant's declared resources. Some income is subsequently disregarded. Certain state benefits are disregarded by statute. Discretionary disregards cover other similar benefits, a proportion of a student grant and

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other minor items. With a self-assessment system, applicants would be instructed to disregard specified items.

15. Wages/ salaries. Most applicants should have little difficulty in identifying their earnings (including sick pay etc.) for the previous year. They would subsequently need to produce proof of earnings, preferably in the form of a statement from their employer (similar to the existing Form L17) and/or proof that they were unemployed during periods for which no earnings are declared.

16. Income from self-employment. Business assessments are more complex. They are currently performed by a specialist LAAO team. Self-assessment would have to be based on the latest set of certified accounts. However, it seems preferable to retain an initial assessment by the LAAO or LAB in such cases.

17. Benefits. There various types of state benefit can be considered in four categories.

(a) Income support already entitles the recipient to automatic free legal aid.

(b) Benefits paid in lieu of normal earnings (unemployment benefit, sickness benefit, maternity allowance) should be declared, as should longer term equivalents (such as invalidity benefit or state retirement pension). A statement of benefit paid should be provided.

(c) Certain benefits (including Child Benefit which is not means tested) are granted in respect of specific commitments. The effect of these could be offset in the relevant allowances. The allowances for dependent children would be net of Child Benefit. Applicants would declare housing costs net of any housing benefit received.

(d) Benefits paid in special cases (eg. mobility allowance, social fund payments) would be disregarded.

18. Investment income. This is a relatively minor factor at present. In most cases, interest would represent an additional calculation for the litigant, but make little material difference. However, it may be more significant for some of the

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richer applicants who could apply to a safety net. Although the average amount of interest declared by applicants in the means survey was £173, the highest figure was almost £7000. These cases could be brought in without troubling the majority of litigants, by setting a fairly high minimum level to be declared.

19. Benefits in kind. The LAAO calculates two main types of benefit in kind.

(a) Company cars. The taxable value of this benefit is readily identified from Inland Revenue form P2.

(b) Food and heating. An arbitrary addition is made to income to counteract the effect of allowing payments for board and lodging which include food and heating (see paragraph 27 below).

20. Other income. This category includes all other types of income recorded by the LAAO. The significant items, which should be specifically listed in the instructions to litigants, are private pensions, maintenance payments, rent from lodgers or tenants, income from trusts and educational grants. Other minor sources of income would be disregarded.

21. Partners' income. This is a major factor in existing applications. Applicants would be required to provide proof of their partner's employment status and earnings as well as their own, and declare their other relevant income.

Sources of capital

22. Capital plays a fairly limited role in existing applications for legal aid (see Annex C, paragraph 6). However, some potential users of the safety net could have significant amounts of capital which it would be necessary to take into account.

(a) Most capital takes the form of deposits and shares. Litigants should have little difficulty since these have a known financial value at any given time.

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(b) Valuables and other property. There were 47 and 53 instances respectively in the survey. These could be disregarded or litigants could be asked to declare a value for specified types of item: second homes, second cars, jewellery, artwork. A professional valuation or the insured value could be used.

(c) Insurance policy loan values. These can be difficult to determine and few companies now give them. However, loan values rarely affect the outcome of an assessment: 89% of occurrences are in cases below the free limit. They should therefore be disregarded.

(d) Loan value of business: 24 instances. These require detailed treatment (see paragraph 16 above).

(e) Reversions and money owed. There were 19 cases in the survey. The current rules require the LAAO to estimate likely receipts during the computation period. These count as capital whether they are actually received or not. Safety net litigants could be required to add money actually received after the start of a case to their spending limits.

Allowances

23. Chapter 7 (paragraph 32) identified two possible ways of defining the expenditure commitments for which an allowance should be made. In either case, specific allowances should only be necessary for items which tend to be sufficiently large to have a significant effect on outcome and of sufficiently varied size or incidence to preclude standardisation. The free limit and the contributory fraction should be deemed to allow for all other expenditure.

24. The various allowances which are currently made are discussed below. The most significant, in terms of affecting the outcome for an application, are housing expenditure and dependants.

25. Taxes. Applicants would determine their income net of tax and National Insurance. Local Government taxation would also be allowed.

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26. Dependants. Standard allowances for spouse and each child could readily be subtracted by the applicant, although the number of age bands might be simplified. The status/age of the dependant would be that at the start date of the case. Where regular maintenance was paid to non-resident relatives, the actual amount paid during the computation period could be subtracted.

27. Housing. Chapter 7 (paragraph 32) discussed the alternative approaches to housing expenditure. If actual expenditure was allowed, applicants would need to provide proof of their rent or mortgage and water rates. Those whose rent included food and heating would need to deduct a fixed proportion of the rent to reflect this.

28. Employment expenses. These include travel, Trade Union and professional fees and superannuation contributions. The last are usually deducted at source, but the others could prove difficult for applicants to calculate and prove. Employment expenses are claimed by about half of all applicants, but a much higher proportion of contributors. When claimed, they average about 6% of gross income. A standard deduction from earned income could be made or travel to work and membership fees could be deemed to be covered by the contributory fraction.

29. Discretionary allowances against income. The abolition of discretionary allowances has been recommended in the past by the 1978 report and the 1986 scrutiny. They are not consistent with the narrower definition of allowable items (Chapter 7, paragraph 32a) since they generally relate to expenditure commitments that the applicant could have chosen not to make. In any event, discretions could clearly not be self-assessed; nor are they consistent with a retrospective computation period, since they may refer to non-recurring items. Most discretionary items should therefore be abolished under a simplified system.

30. The main categories in which the LAAO exercises its discretion are:

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(a) Certain hire purchase and loan repayments. Generally, credit repayment is deemed to be covered by the free limit, but is allowed for home improvements, some house purchases (see (d) below) and in cases of hardship.

(b) Debts: primarily arrears in respect of rent, mortgage, utilities and credit.

(c) School fees.

(d) Upkeep of second homes is allowed, where there is good reason for having two homes, for example the applicant works a considerable distance from the family home.

(e) Retirement policy premiums paid by the self-employed etc. As with other superannuation payments, these should continue to be allowed.

31. Capital allowances or disregards. These were claimed in 115 cases in the means survey, including 76 of 336 cases (23%) above the free limit. They are made up of contingent liabilities under a bond or covenant (8 cases in total), debts to be repaid during the computation period (45 cases) and money set aside for other exceptional commitments such as moving house (64 cases). The circumstances under which capital set aside for other purposes might be disregarded should be made explicit. This should reflect the approach taken to income allowances. Under a self-assessment system, litigants could make an initial application (see Chapter 9, paragraph 9) to claim such a disregard.

Conclusion

32. A simplified system of means assessment should allow litigants to calculate accurately their eligibility for legal aid and/or their safety net spending limit. In essence, they would consider their annual earnings net of tax, housing expenditure and dependants' allowances. A number of other factors which are currently taken into account would be standardised or disregarded.

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